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In The

Supreme Court of the United States

October Term, 1997

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

EDWARD L. WICKER, SR., SAMUEL D. WEAVER, THOMAS E. KLEINER, JOHN MCKEE, AND JOHN KALTENBRUNNER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. DOES § 5 OF THE FEDERAL EMPLOYERS' LIABILITY ACT LIMIT THE VALIDITY OF AN OTHERWISE VALID RELEASE EXECUTED BY AN EMPLOYEE AS A PART OF A SETTLEMENT OF A CLAIM FOR DAMAGES?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIPS

This petition involves five consolidated cases decided by the United States Court of Appeals for the Third Circuit. The caption of the case contains the names of all the parties; hence, pursuant to Supreme Court Rule 14.1(b), those names will not be repeated here.

Petitioner, Consolidated Rail Corporation, is a wholly-owned subsidiary of Conrail, Inc. The subsidiaries of Consolidated Rail Corporation are: Indiana Harbor Belt Railroad Company, Lakefront Dock & Railroad Terminal Company, Albany Port Railroad Company and LMS Partnership.

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PETITION FOR A WRIT OF CERTIORARI

Consolidated Rail Corporation ("Conrail") respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case.

Fifty years ago, in *Callen v. Pennsylvania R. Co.*, 332 U.S. 625 (1948), this Court held that a general release executed by a railroad employee as part of a settlement of a claim did not violate the provisions of § 5 of the Federal Employers' Liability Act ("FELA"). Section 5 voids any contract or device designed to "enable any common carrier to exempt itself" from liability. In *Callen*, this Court concluded that "[i]t is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability." *Id.* at 630. The Court has not addressed the effect of § 5 on a release negotiated as part of a settlement of a claim since its decision in *Callen*.

Since *Callen*, the lower courts have struggled over the meaning of the phrase "compromising a claimed liability." As a result, the lower courts have reached widely divergent conclusions over the effect of § 5 on an otherwise valid release executed as part of a negotiated settlement of an FELA claim. Some courts, including the Court of Appeals for the Third Circuit here, have concluded that *Callen's* interpretation of § 5 voids any release which purports to extinguish unknown risks, however, a release which extinguishes future risks which are known to the employee when he or she executed the release does not, in certain circumstances, run afoul of § 5. Other courts, including the Court of Appeals for the Sixth Circuit, have concluded that despite *Callen*, any release which attempts

to extinguish future injuries of an employee is void under § 5 even if the risk of that injury was known to the employee when he or she executed the release. A third view adopted by a number of lower courts is that *Callen* stands for the proposition that § 5 has no effect whatsoever on the validity of a release executed by an employee as part of a negotiated settlement of an FELA claim. Rather, the validity of such a release should be judged solely according to contract law.

The resolution of these widely divergent interpretations of *Callen's* analysis of the effect of § 5 on the validity of releases executed as part of a settlement of an FELA claim is critical at this time for two reasons. First, releases of employees' claims "play an important part in the [FELA's] administration" and in determining the validity of such releases, uniformity throughout the county is "essential to effectuate the [FELA's] purposes." *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 361-362 (1952). Second, the ever-increasing proliferation of occupational disease claims and the resulting number of multiple lawsuits from the same employee render imperative a clear, national, uniform rule as to the validity of releases executed as part of a settlement of an FELA claim.

Without guidance from this Court, the effect of § 5 on the validity of a release given as part of a settlement of an FELA claim will vary throughout the country, leaving the rights of employees and employers subject to the vagaries of the geographic locale of an employee's injury. With the settlement of claims so commonplace and with releases such an integral component of the settlement process, Petitioner submits that the effect of § 5 on the validity of releases is an important and recurring issue of federal

law. This Court should grant certiorari to resolve the uncertainty and lack of uniformity that has arisen in the courts on this issue.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at *Wicker v. Consolidated Rail Corporation*, 142 F.3d 690 (3d Cir. 1998), and is reprinted in the appendix hereto at App. 1a-28a. The opinion of the District Court is not reported. It is reprinted at App. 29a-50a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on April 29, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

§ 5 of the Federal Employers' Liability Act, 45 U.S.C. § 55, provides:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to

any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

STATEMENT OF THE CASE

Respondents, Edward L. Wicker, Sr., Samuel D. Weaver, Thomas E. Kleiner, John McKee, and John Kaltenbrunner are all former employees of Petitioner, Consolidated Rail Corporation ("Conrail"). Each of them brought suit under the FELA against Conrail alleging various injuries caused by exposure during the course of their employment to polychlorinated biphenyls ("PCBs"), chlorinated solvents, caustic soda, lead-based paint, sandblasting grit, diesel and other fuel, turpentine and/or paint thinner, fuel filters, incinerator smoke, drummed wastes, weed killer and other yet-to-be identified hazardous and toxic substances. Federal jurisdiction over their lawsuits was based on 28 U.S.C. § 1331.

Each of the Respondents had previously asserted claims against Conrail and, as part of negotiated settlements of those claims, had executed general releases which, by their express terms, settled all claims for all injuries known and unknown, both past and future.[1]

Citing these general releases, Conrail filed motions for summary judgment, asserting that Respondents'

[1] Pursuant to Supreme Court Rule 14.1(i)(vi), the releases executed by the five Respondents are attached to the Appendix at App. 51a-72a.

FELA claims were extinguished by these previously executed releases. App. 7a. In opposing Conrail's motions, Respondents argued the releases only barred future claims for the specific injuries that were the subject of the earlier litigation and asserted the contract defenses of mutual mistake, fraud and lack of consideration to enforcement of these releases. App. 7a-8a.

In addition to these contract defenses, Respondents argued that the releases were unenforceable under § 5 of the FELA, 45 U.S.C. § 55, which provides:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

The District Court concluded the releases "contain language which, on its face, relieves the defendant from future liability for any type of damage or harm suffered by the plaintiffs while in the railroad's employ." App. 34a. The court rejected all of Respondents' contract defenses to the releases, finding the language of the releases to be unambiguous. App. 42a. The court also concluded there was no evidence of mutual mistake or fraud and the releases were not contracts of adhesion,

since Respondents were represented by counsel and the releases were "bargained for." App. 42a-43a.

The District Court then proceeded to reject Respondents' defense under § 5 of the FELA, reasoning that the releases "served the beneficial purpose of adjusting and providing finality to, all claims between the parties." App. 46a. The court further reasoned that persons who sign releases which bargain away their right to sue for future injuries "receive higher settlements than they would to settle specific claims" and defendants such as Conrail are "willing to pay a higher amount to settle . . . either for reasons of efficiency in dealing with claims, or to eliminate uncertain liabilities." App. 47a. The District Court concluded that to bar enforcement of these releases due to § 5 of the FELA "would lead to uncertainty in the future adjustment of FELA claims, hinder attempts at settlement by employers, and ultimately lead to more litigation." App. 48a. Accordingly, the District Court granted Conrail's motion for summary judgment.

On appeal, Respondents abandoned their various contract-related defenses and relied solely on their contention that the releases were void under § 5 of the FELA. App. 10a. Hence, the sole issue on appeal was whether § 5's bar of " '[a]ny contract . . . the purpose of which shall be to enable [an employer] to exempt itself' from FELA includes a general release of claims executed by an employee as part of a settlement." App. 12a.

The Court of Appeals reversed. The Court focused its analysis on this Court's decision in *Callen v. Pennsylvania R. Co.*, 332 U.S. 625 (1948). App. 14a. In *Callen*, this Court

upheld a general release given by a railroad employee as part of a settlement of a claim, holding "[i]t is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability." *Id.* at 630.

After discussing *Callen*, the Court of Appeals expressed its deep uncertainty over the scope and meaning of *Callen's* interpretation of § 5. The Court of Appeals noted that *Callen* "did not explain what will qualify as a 'compromis[e] [of] a claimed liability' " (App. 15a), that "the proper application and reach of § 5 remains unclear" and that "the Court [since *Callen*] has not had occasion to explain how wide a net its ruling casts." App. 17a. The Court continued by emphasizing that "there was no specific section of the statute which addresses the rights of FELA plaintiffs to settle their claims" (App. 18a), that "not surprisingly" the lower courts had "disagreed on the proper interpretation of § 5" (App. 20a) and that "the question remains whether there is a way to protect employees' statutory rights while also upholding the parties' right to settle claims by contract." App. 23a.

Describing the issue as "troublesome" (App. 23a), the Court of Appeals rejected what it described as a "bright line rule" established by the Court of Appeals for the Sixth Circuit in *Babbitt v. Norfolk & Western Ry. Company*, 104 F.3d 89 (6th Cir. 1997). App. 24a. In *Babbitt*, the Sixth Circuit held that § 5 of the FELA invalidates any release which purports to extinguish future claims, even if the employee was aware of those future claims when he or she executed the release. The Third Circuit also rejected the position taken by several federal district courts, including the District Court here, that "general releases

do not contravene the purposes of FELA and may bar a subsequent claim." App. 20a.

Instead, the Court of Appeals adopted a third interpretation of the effect of § 5 on the validity of releases, holding as follows:

> We hold that a release does not violate § 5 provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to those risks which are known to the parties at the time the release is signed. Claims relating to unknown risks do not constitute 'controversies' and may not be waived under § 5 of FELA.

App. 25a.

The Court of Appeals then attempted to articulate a standard for determining when an employee will be deemed to have knowledge of a particular future risk such that a claim arising from such a risk can be extinguished by a general release. App. 25a. Describing its standard as a "fact-intensive process" and recognizing the "elusiveness of any such determination," the Court of Appeals held the release itself was "strong, but not conclusive, evidence of the parties' intent". App. 25a.

The Court of Appeals concluded its opinion by expressly recognizing that the standard it had articulated for determining the validity of a release under § 5 of the FELA was "a different (and more difficult) standard for railroad employers than is typical in non-FELA situations." It justified this "different standard" by what it

described as this Court's "pro-employee construction of the FELA". App. 26a.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE EFFECT OF § 5 OF THE FELA ON THE VALIDITY OF A RELEASE EXECUTED AS PART OF A SETTLEMENT OF A CLAIM IS AN IMPORTANT AND RECURRING ISSUE OF FEDERAL LAW THAT SHOULD BE RESOLVED IN A UNIFORM AND CONSISTENT MANNER THROUGHOUT THE COUNTRY.

In *Callen v. Pennsylvania R. Company*, 332 U.S. 625 (1948), this Court examined the effect of § 5 of the FELA on the validity of a general release executed by a railroad employee as part of a settlement of an FELA claim. In rejecting the employee's argument that the burden of establishing the validity of a release should rest with the employer, the Court emphasized Congress' silence on the subject of releases in the FELA, and concluded that "until the Congress changes the statutory plan, the releases of railroad employees stand on the *same basis* as the releases as others." *Id.* at 630 (*emphasis added*). The Court then proceeded to explicitly reject the employee's contention that § 5 of the FELA somehow mandated a different result, holding that "[i]t is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability." *Id.* at 630.

This Court subsequently reaffirmed the general principle set forth in *Callen* that "[u]ntainted by fraud or

overreaching, full and fair compromises of FELA claims do not clash with the policy of the Act." *South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367, 372 (1953). Importantly, however, since its decision in *Callen*, the Court has not addressed the effect of § 5 on the validity of a release executed as part of a negotiated settlement of a claim. In particular, the Court has not offered any guidance as to the meaning of the phrase "compromising a claimed liability," the key element in its holding.

While the Court has not addressed the effect of § 5 of the FELA on the validity of a release executed as part of a negotiated settlement, the Court has emphasized since *Callen* the need for uniformity in judging the validity of releases under the FELA. As the Court explained in *Dice v. Akron, Canton and Youngstown R. Co.*, 342 U.S. 359 (1952):

> [O]nly if federal law controls can the federal Act be given that *uniform application throughout the country essential to effectuate its purposes.* (citations omitted.) Release and other devices designed to liquidate or defeat injured employees' claims play an important part in the federal Act's administration. (citation omitted.) Their validity is but one of the many interrelated questions that must constantly be determined in these cases according to a *uniform federal law.*

Id. at 361-362. (*emphasis added.*)

The Third Circuit's holding, coupled with the widely divergent interpretations of § 5 and *Callen* adopted by the Sixth Circuit and the other lower courts, highlights the uncertainty, confusion and lack of uniformity in the

courts over the effect of § 5 on the validity of otherwise valid releases given as part of a settlement of a claim.

The Sixth Circuit has addressed the effect of § 5 of the FELA on the validity of releases in two cases – *Wilson v. CSX Transportation, Inc.*, 83 F.3d 742 (6th Cir. 1996), and *Babbitt v. Norfolk and Western Railway Company*, 104 F.3d 89 (6th Cir. 1997). In *Wilson*, a railroad employee filed suit against CSX for lung disease which he claimed was caused by inhalation of dust on the job. The employee settled that suit and received $13,500.00 in exchange for a release which provided, *inter alia*, that CSX would be released and discharged for all future occupational disease claims, including cancer of the respiratory system arising from dust inhalation. *Id.* at 743-44.

After executing this release, the employee continued to work for CSX. He brought a second suit against CSX, again citing injuries caused by exposure to rock dust. *Id.* at 744. Citing the release, the District Court granted summary judgment against the employee. The Sixth Circuit reversed, holding that any release which discharges a railroad employer's liability for future conduct contravenes § 5 of the FELA. *Id.* at 745.

In *Babbitt*, the Sixth Circuit reaffirmed *Wilson*, holding that in order for a release to be valid under § 5 of the FELA, it "must reflect a bargained-for-settlement of a known claim for a specific injury, as contrasted with an attempt to extinguish potential future claims the

employee might have arising from injuries known or unknown by him." *Babbitt*, 104 F.3d at 93.[2]

The direct conflict between the Sixth Circuit's holdings in *Wilson* and *Babbitt* and the holding of the Third Circuit here is apparent. In the Sixth Circuit, any release which attempts to extinguish a future risk, whether known or unknown to the employee when the release was executed, contravenes § 5. The Third Circuit, however, explicitly rejected such a "bright-line rule," holding instead that a release which discharges a risk that is "*known* to the parties at the time the release is signed" does not violate § 5. The Third Circuit distinguished between "known" future risks and "unknown" future risks, holding that under *Callen's* interpretation of § 5, a release which attempted to extinguish an unknown risk is invalid and unenforceable. App. 25a.

As these conflicting holdings from the Third Circuit and Sixth Circuit disclose, a railroad employee who executes a release in the Sixth Circuit *can* maintain a subsequent claim against his or her employer for any "new" injury even if the prior release explicitly extinguishes

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[2] *Babbitt* involved the validity of a Resignation and Release agreement signed by employees when they separated from the company. Under a long line of cases beginning with *Philadelphia, Baltimore, & Washington R. Co. v. Schubert*, 224 U.S. 603 (1912), such an agreement, as contrasted with a release given in exchange for a settlement of a claim, is a "contract" or "device" designed to exempt the employer from liability in violation of § 5 of the Act. Conrail submits, however, that § 5 has no application whatsoever to a release given in exchange for the settlement of a claim or, in the words of this Court, as a "compromise[ing] of a claimed liability." *Callen*, 332 U.S. at 630.

claims arising from this "new" injury and even if the employee was fully aware of the risk of this "new" injury when he or she signed the release. That very same release, however, would extinguish the employee's claim in the Third Circuit, if the "new" injury was a risk "known" to the employee at the time the release was signed.

In addition to the direct conflict between the Third and Sixth Circuits, the uncertainty generated by *Callen* on the effect of § 5 on the validity of a release executed as part of a settlement of a claim is also apparent from the varying approaches of the lower courts, which have offered yet another view on the effect of § 5. These courts have held that § 5 has no effect whatsoever on the validity of general releases. *See, e.g., Overstreet v. Atlantic Coast Line Railroad Company,* 152 So.2d 188, 190 (Fla. 1963); and *Bruner v. Illinois Central Railroad Co.,* 578 N.E.2d 1385 (Ill. App. 1991). In *Overstreet,* the District Court of Appeals of Florida cited *Callen* for the proposition that "a claim founded upon the FELA may be compromised between the parties on the *same basis* as the release of others and . . . Section 55 does not apply to such a compromise." *Id.* at 191. Similarly, in *Bruner,* Illinois' intermediate appellate court found that a general release given by a railroad employee as part of a settlement of his lung disease claim barred his subsequent claim for hearing loss.[3]

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[3] Other cases reaching this same conclusion include: *Williams v. Norfolk Southern Corp.,* C.A. 1:92-545-HTW (N.D. Ga. January 22, 1993); and *Satterfield v. CSX Transp., Inc.,* No. 93-002-R (W.D. Va. December 22, 1993).

Importantly, these widely varying and conflicting approaches taken by the courts prompted the Third Circuit to repeatedly express the need for guidance on the meaning, scope, and effect of § 5. Hence, in discussing *Callen*, the Third Circuit emphasized that the Supreme Court "did not explain what would qualify as a 'compromis[e] [of] a claimed liability' " (App. 15a) and "the proper application and reach of § 5 remains unclear." App. 17a. Further, after discussing several of the Court's post-*Callen* decisions, the Third Circuit concluded the holdings in those cases fail to provide "any guidance as to the proper application of § 5." App. 17a. Describing the issue as "troublesome," the Third Circuit reasoned that under the current state of the law, a general release could be viewed as a means of evading FELA liability (and hence violative of § 5) or could be viewed as "a rational and considered way to resolve claims and liabilities." App. 23a.[4]

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[4] It is not surprising the Third Circuit described this issue as a "troublesome question", since the court's conclusion that § 5 *was* applicable to the validity of a release seems to run counter to its earlier conclusion that FELA releases should be judged solely by contract law. Hence, in *Good v. Pennsylvania Railroad Company*, 384 F.2d 989 (3d Cir. 1967), the Third Circuit concluded as follows:

> The fact that this action was brought under the Federal Employers Liability Act does not remove it from the realm of the law of contracts. The obligation to remain bound by a valid agreement of settlement duly entered into by counsel with the authority of his client is one which pervades the law and applies to injured railroad employees as well as all other contracting parties.

Id. at 990.

Finally, the Third Circuit requested guidance from this Court, stating that:

> Although the Supreme Court in *Callen* refused to void the releases executed in compromise of an employee's claims, the Court has not had occasion to explain how wide a net its ruling casts.

App. 17a.

The importance of this issue and the need for guidance and direction from this Court to resolve the uncertainty and confusion over the effect of § 5 on the validity of a release executed as part of the settlement of a claim cannot be overstated. As the Court clearly expressed in *Dice*, "[r]eleases . . . designed to liquidate or defeat injured employees' claims play an important part in the [FELA's] administration." *Dice*, 342 U.S. at 361.[5] Absent a resolution by this Court, employees and employers will be faced with uncertainty and confusion whenever they attempt to achieve finality of their disputes through a settlement of their FELA litigation. The scope and effect of releases executed as part of that settlement process should not be dependent on the geographic locale of the employees' claim. Rather, as this Court has clearly expressed, only through "uniform application throughout

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[5] It is important to note at this juncture that any holding relating to the effect of § 5 on the validity of releases executed as a part of a settlement of a railroad employees' claim will be equally applicable to suits brought by maritime employees under the Jones Act. *See American Dredging Co. v. Miller*, 510 U.S. 443, 456 (1994) (the Jones Act adopts "the entire judicially developed doctrine of liability" under the FELA, including the "uniformity requirement" of the FELA. *Id.* at 456.)

the country" can the purposes of the FELA be effectuated. *Id.*

The uncertainty and lack of uniformity throughout the country over the meaning of *Callen's* interpretation of § 5 creates a number of unresolved issues, the resolution of which now depends solely on where the case is brought. Does § 5 have any application at all to the validity of a bargained-for release which extinguishes claims for known and unknown risks or are such releases governed by the same common law contract rules as releases executed in non-FELA cases? Does § 5 void any release which attempts to extinguish a future claim of a railroad employee? Can a release validly extinguish a future claim if the risk of that future claim is "known" to the parties at the time the release is signed? What evidence should be considered in determining whether an employee had sufficient knowledge of the future claim when he or she executed the release?

The need for uniformity on the validity and effect of releases executed as part of negotiated settlements of FELA claims is particularly critical in the railroad and maritime industries, since Congress, by statute, has allowed employees in those industries to sue their own employers, as opposed to other industries where such suits are barred by state workmen's compensation laws. Moreover, with the ever increasing growth in the number of occupational disease claims filed by such employees, railroad and maritime employers are frequently faced with multiple lawsuits from the same employee. According to statistics compiled by the Association of American Railroads, over 21,000 claims and suits predicated on exposure to asbestos, carpal tunnel syndrome and noise

induced hearing loss alone were pending against railroad employers at the close of 1996 and the payouts by railroad employers on claims and suits in these three occupational disease categories totalled in excess of $100,000,000 in that same year.[6] Recently, this Court in *Metro-North Commuter Railroad Company v. Buckley*, 117 S. Ct. 2113 (1997), also highlighted this growth in occupational disease claims, noting that an estimated 21 million Americans have been exposed to work-related asbestos alone. *Id.* at 2119.

In addition to asbestos, carpal tunnel and hearing loss claims, the list of potential occupational disease claims that have been and will in the future be the subject of releases given as part of a settlement of a claim includes claims for silicosis, dust inhalation, solvents and diesel/exhaust. In all of these cases, both employees and employers need to have a clear understanding of what claims can and cannot be validly released as part of any negotiated settlement. The purpose of the FELA is not to "add burdens to the business enterprises of the country, but rather to promote the welfare of *both* employer and employee, by adjusting the losses and injuries inseparable from industry and commerce . . . to those who . . .

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[6] The exact figures for 1996 in these three categories (asbestos, carpal tunnel and hearing loss) was 21,117 claims and suits pending and payouts totalling $103,646,507. In 1995, these figures were even higher, as the number of claims and suits totalled 23,206 and the payouts totalled $110,780,444. ASSOCIATION OF AMERICAN RAILROADS, 1995 CLAIM & LITIGATION REPORT 2-14 (1996) and ASSOCIATION OF AMERICAN RAILROADS, 1996 CLAIM LITIGATION REPORT 2-14 (1997).

ought to share the burden." S. Rep. No. 460, 60th Cong., 1st Sess. 4 (1908) (*emphasis added*).[7]

Petitioners submit that the instant case is a particularly appropriate case for certiorari to be granted, since Respondents abandoned on appeal all of the various contract-related defenses to the validity of the releases in question, leaving the effect of § 5 as the sole issue before the Court. It has been 50 years since the Court, in *Callen*, last addressed the effect of § 5 on an otherwise valid release and, as the discussion above reflects, considerable confusion and uncertainty in the courts has occurred since that time.

The effect of § 5 on the validity of releases raises the kind of the questions that require careful examination and clear guidance from this Court. As the Third Circuit itself recognized, Congress chose to be silent on the subject of releases (App. 18a), leaving it up to the courts to develop rules and guidelines concerning the validity of releases "to meet changing conditions and concepts of industry's duty toward its workers." *Kernan v. American Dredging Company*, 355 U.S. 426, 432 (1958). Since *Callen* first discussed the effect of § 5 50 years ago, this Court has not had the opportunity to clearly articulate for both employees and employers what claims can and cannot be

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[7] According to the General Accounting office, private industry as a whole pays around $0.36 per employee hour worked under state workers' compensation, GENERAL ACCOUNTING OFFICE, INTERCITY PASSENGER RAIL: FINANCIAL AND OPERATING CONDITIONS THREATEN AMTRAK'S LONG-TERM VIABILITY 59 (1995), compared to nearly $2.00 for railroads. ASSOCIATION OF AMERICAN RAILROADS, 1995 CLAIM & LITIGATION REPORT 2-2 (MAY 1995).

validly released when FELA claims are settled. Accordingly, Petitioners respectfully submit that the time is ripe for this Court to resolve the confusion and uncertainty over the effect of § 5 on such releases by granting certiorari and resolving the issue so that a uniform rule throughout the country, consistent with the FELA's purposes, can be adopted.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH APPLICABLE PRECEDENTS FROM THIS COURT.

The Court of Appeals' holding that § 5 of the FELA is applicable to the validity of an otherwise valid release given as part of a settlement conflicts with the holdings of this Court, as well as the legislative history of § 5.

At the time of the FELA's enactment in 1908, many railroads "insist[ed] on a contract with their employees discharging the company from liability for personal injuries." H.R. Rep. No. 1386, 60th Cong., 1st Sess. 6 (1908). These contracts effectively deprived employees of the right to file actions at law against their employer. S. Rep. No. 400, 60th Cong., 1st Sess. 3 (1908). Section 5 was designed to limit the railroad's right to escape liability through such contracts.

In *Philadelphia, Baltimore, & Washington R. Co. v. Schubert*, 224 U.S. 603 (1912), the Court held that § 5 invalidates contracts made prior to any injury which released an employer from liability. In *Duncan v. Thompson*, 315 U.S. 1 (1942), this holding was extended to agreements entered into after the employee was injured.

Because neither *Schubert* or *Duncan* dealt with the effect of § 5 on a release given in exchange for a settlement of a claim, the Supreme Court addressed that issue in *Callen*. The employee in *Callen* had brought an FELA action for a work-related injury and, as part of the settlement of that claim, had executed a "general release of all claims and demands which I have or can or may have against the said Pennsylvania Railroad Company for or by reason of personal injury sustained by me at the time and place involved in the suit." *Callen*, 332 U.S. at 626-627. When the railroad raised this general release as a bar to the employee's subsequent suit, the employee argued that the release violated § 5 and was therefore invalid. This Court rejected this argument, holding as follows:

> It is obvious that a release is not a device to exempt from liability, but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation.

Id. at 630-631.

Since *Callen*, the Court has reaffirmed its approval of releases given in exchange for a settlement of a claim. The Court has explained that *Callen* "distinguished a full compromise enabling the parties to settle their dispute without litigation . . . [which does not] contravene the Act, from a device which obstructs that Liability Act plaintiff to secure that maximum recovery if he should elect judicial trial of his cause." *Boyd v. Grand Trunk Western R. Co.*, 338 U.S. 263, 266 (1949).

Despite these pronouncements that § 5 could not be utilized as a vehicle to invalidate an otherwise valid release, the Third Circuit held that certain releases (those which attempted to extinguish unknown risks) were per se invalid. Moreover, the Court of Appeals held that even where the release specifically itemizes the risks known to the parties at the time the release is executed, subsequent lawsuits founded on those risks will not necessarily be waived. Instead, the release which chronicles those known risks will be "strong, but not conclusive, evidence of the parties' intent." App. 25a.

In crafting what it recognized was a fact intensive and elusive standard, the Third Circuit also acknowledged it was imposing a standard in an FELA case that was not placed there by Congress. Hence, the Third Circuit stated "there is no specific section of the statute which addresses the rights of FELA plaintiffs to settle their claims." App. 18a. Further, despite *Callen's* unequivocal statement that "the releases of railroad employees stand on the *same basis* as the releases of others", the Third Circuit acknowledged that the standard it was imposing in assessing the validity of a release under § 5 was a "different (and more difficult) standard for railroad employers than is typical in non-FELA situations." App. 26a.

Congress' silence on the subject of releases is significant, since this Court has made it clear that where the FELA is silent on a particular issue, common-law principles "must play a significant role" in any interpretation of the statute. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994). As the Court explained:

> "[A]lthough common-law principles are not necessarily dispositive of questions arising under the FELA, unless they are *expressly rejected* in the text of the statute, they are entitled to great weight in our analysis."

Id. (*emphasis added*).[8]

Here, *Callen* and the Third Circuit recognized Congress' silence on the subject of the validity of a release executed as part of a settlement of a claim. Citing the FELA's silence, *Callen* held that the validity of release of a FELA employee should be judged on the "same basis" as a non-FELA employee. *Callen*, 332 U.S. at 630. Petitioner submits, therefore, that the Third Circuit's holding directly conflicts with *Callen* and certiorari should be granted to make clear that § 5 has no effect on the validity of a release given as part of a settlement of a claim. The validity of such releases should be judged solely by contract law. Such a holding will provide sufficient protections to injured employees consistent with the Act's purposes, since contract law permits FELA releases to be set aside on grounds of fraud, lack of consideration, and

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[8] *See also, Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330 (1988) (citing Congress' silence on the availability of prejudgment interest under the FELA, the Court reversed an award of delay damages in a FELA suit brought in Pennsylvania's state courts).

mutual mistake. *See Counts v. Burlington Northern Railroad Company*, 952 F.2d 1136, 1142 (9th Cir. 1991).[9]

CONCLUSION

For the foregoing reasons, Petitioner Consolidated Rail Corporation, respectfully requests that this Court grant its Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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[9] The courts have provided additional protections and safeguards to railroad employees by holding an employee can avoid a release under the FELA by proving fraud or mutual mistake by a preponderance of the evidence. He or she need not establish such defenses by clear and convincing evidence. *Dice*, 342 U.S. at 361, n.1. In fact, in cases under the Jones Act, the courts have placed the burden of establishing the validity of releases on the employer. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248 (1942).

Edward L. WICKER, Sr., Appellant
at No. 97-3034,

Samuel D. Weaver, Appellant
at No. 97-3035,

Thomas E. Kleiner, Appellant
at No. 97-3036,

John W. McKee, Appellant
at No. 97-3037,

John M. Kaltenbrunner, Appellant
at No. 97-3038,

v.

CONSOLIDATED RAIL CORPORATION.

Nos. 97-3034 to 97-3038.

United States Court of Appeals,
Third Circuit.

Argued Sept. 23, 1997.

Decided April 29, 1998.

James M. Flood (argued), Howard S. Stevens, Stevens & Johnson, Allentown, PA, for Appellants.

Stephen M. Houghton (argued), Peter T. Stinson, Dickie, McCamey & Chilcote, Pittsburgh, PA, for Appellee.

Before: BECKER, Chief Judge, and SCIRICA and McKEE, Circuit Judges.

OPINION OF THE COURT

SCIRICA, Circuit Judge.

The issue on appeal is whether § 5 of the Federal Employers' Liability Act[1] voids a general release of claims given as part of a negotiated settlement.

I.

A.

Plaintiffs Edward Wicker, Sr., Samuel Weaver, Thomas Kleiner, John McKee and John Kaltenbrunner are all former employees of defendant Consolidated Railroad Corporation who were injured during the course of their employment. Each plaintiff negotiated a settlement of claims with Conrail and executed a release. While the releases were not identical, each appeared to settle all claims for all injuries past and future. Plaintiffs subsequently suffered injuries as a result of exposure to toxic chemicals at Conrail's Hollidaysburg Reclamation Plant in Blair County, Pennsylvania.

B.

Edward Wicker retired from Conrail in 1982. Before retiring, Wicker suffered injuries as a result of exposure

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[1] Section 5 of FELA provides:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable the common carrier to exempt itself from any liability created by this chapter, shall to that extent be void. . . .

45 U.S.C. § 55 (1986).

to asbestos and, in January 1988, signed a release settling his asbestos related claims. Wicker believed the release related solely to his asbestos injuries, and testified he would not have executed a release with a broader scope. Wicker claims he was also exposed to trichlorethylene and trichloroethane while employed at Conrail, and may have been exposed to other toxic chemicals without his knowledge. Wicker now suffers from blackouts, seizures, vertigo, stiffness in his hands, and burn spots in front of his eyes, all of which he attributes to his exposure to chemicals while employed at Conrail. He does not believe any of his injuries are related to asbestos exposure, the subject of his initial settlement.

Samuel Weaver was employed by Conrail from 1974 until 1991. In February 1989, Weaver severely injured his back on the job. In September 1991, Weaver signed a release and a Letter of Agreement not to return to work. Weaver believed the release related only to his back injury, and said he would not have signed it otherwise. Weaver testified that he was exposed to chemicals during the course of his employment, and alleges that he suffers from swollen eyes, infected tear ducts, nosebleeds, headaches, respiratory difficulties, an enlarged liver, skin rashes, dizziness, lipomas, cracking lips, indigestion, overgrowth of skin on his thumbs, xerodermatitis, shortness of breath, fatigue, black mucous substances in his mouth and nose, foot numbness, muscle cramps, spastic colon and benign lumps. Weaver claims that while some symptoms existed at the time he executed the release, many are recent developments which were not discovered until after he had signed the release.

Thomas Kleiner was exposed to asbestos while employed by Conrail. In August 1992, Kleiner signed a general release. Kleiner's attorney, Robert Kosseff, testified that neither he nor Kleiner were aware at the time the release was executed that Kleiner had been injured by exposure to chemicals other than asbestos. Kleiner said that he was exposed to various chemicals when he worked on a "slop truck," cleaning out vats filled with caustic soda, soaps, cleaners, chlorinated solvents, and other chemical wastes. As a result, Kleiner suffers from respiratory difficulties, black mucous in his nose and mouth, skin rashes, fatigue, headaches, chest pain, numbness, muscle cramps, nose bleeds, coughing and sinusitis.

In April, 1990, John McKee injured his back while working for Conrail and, as a result, was unable to work for approximately two years. He returned to work briefly and before retiring signed a release and letter of agreement on September 11, 1992, similar to those signed by Weaver. At the time he executed the release, McKee was represented by Robert Kosseff, who testified that neither he nor his client was aware that McKee had been injured by exposure to toxic chemicals. McKee suffers from headaches, respiratory difficulties, nausea, light headedness, skin rashes, chronic indigestion, a bleeding stomach ulcer, kidney stones, blood clots, nervous disorder, and dermatitis. Although McKee testified that he had experienced many of these symptoms before executing the release, he explained that he first connected his symptoms to chemical exposure after he signed the release.

John Kaltenbrunner injured his back in April 1990 while employed by Conrail. In November 1994,

Kaltenbrunner signed a release, and a letter of agreement identical to those signed by Weaver and McKee stating that he would not return to his job. Kaltenbrunner testified he was unaware of his exposure to toxic chemicals during his employment, and that, as a result, he suffers injuries apart from his back injury, including rashes, joint pain, respiratory problems, sinusitis, skin "eruptions," and Legionnaires Disease. Kaltenbrunner also testified that some of these symptoms manifested themselves before executing the release.

C.

The releases signed by Wicker and Kleiner were similar in form and substance, and appear to release Conrail from liability for all claims, both past and future, relating to their employment. Wicker's release provides, in part:

> I, Edward Wicker . . . for the sole consideration of Twenty-one Thousand Dollars ($21,000) . . . hereby release and hereby discharge Consolidated Rail Corporation . . . from any and all losses, claims, liabilities, actions, causes of action . . . and demands of any kind whatsoever in nature . . . which I have or to which I claim to be entitled by reason of any injuries, known or unknown, foreseen or unforeseen . . . which now exist or which may arise in the future as a result of or in any way connected with my alleged exposure to any material, substance, product, and/or good(s) of any kind or nature (including but not limited to dust, fumes, vapors, mists, gases, agents, asbestos or toxic substances of any kind) supplied or permitted to exist by [Conrail], and/or arising out of any working

> condition, of any kind, during my employment by [Conrail]. . . .
>
> I hereby declare and represent that the injuries and illnesses which have been or may be sustained, including mental conditions resulting from asbestos exposure or exposure to any substance, condition or environment or a belief that I was exposed to asbestos, or any substance, condition or environment, are, or may be permanent, and that recovery therefrom is uncertain and indefinite, and that they may cause or lead to other deleterious conditions, including but not limited to cancer, and that in making this Release, it is understood and agreed that I rely wholly upon my own judgment, belief, and knowledge of the nature, extent, effect, duration, and other possible results of said injuries, illnesses, conditions, exposures, and liability therefore, and that the release is made without reliance upon any statement or representation by [Conrail] . . . and that possible future conditions, as yet undetected, including but not limited to cancers of any kind, are included.

McKee and Weaver each signed a standard release form entitled "General Release." These releases provide in part:

> I, [Plaintiff] hereby release and forever discharge [Conrail] from all claims, demands, actions and causes of action of every kind whatsoever and including but without limitation of the foregoing, all liability for damages, costs, expenses and compensation of any kind, nature or description now existing or which may hereafter arise from or out of injuries and damages, known or unknown, permanent or otherwise,

sustained or received by [plaintiff arising from the specific incident being settled].

The release signed by Kaltenbrunner, while similar to those signed by Weaver and McKee, also contains a separate exclusion preserving his claims for carpal tunnel syndrome. That release provides in part:

> I, John M. Kaltenbrunner, for the sole consideration of Fifty Thousand Dollars ($50,000.00) . . . do hereby release and forever discharge [Conrail] from all claims, demands, actions and causes of action of every kind whatsoever and including, but without limitation of the foregoing, all liability for damages, costs, expenses and all incidents, illnesses, diseases, conditions, injuries and damages, known or unknown, permanent or otherwise. . . .
>
> THIS RELEASE SPECIFICALLY EXCLUDES ANY CLAIMS OR CAUSES OF ACTION THAT JOHN KALTENBRUNNER HAS OR MAY HAVE IN THE NATURE OF OCCUPATIONALLY RELATED CARPAL TUNNEL SYNDROME OR OCCUPATIONALLY RELATED REPETITIVE MOTION INJURIES INVOLVING THE UPPER EXTREMITIES ONLY BUT DOES NOT WAIVE ANY SUBSTANTIVE OR PROCEDURAL DEFENSES THERETO.

D.

Each plaintiff brought suit under FELA, alleging various injuries because of exposure to hazardous and toxic substances during the course of their employment with Conrail. Conrail sought summary judgment, citing the previously executed releases. Contending the releases

barred only their claims for back injury and asbestos exposure, plaintiffs raised contract defenses of mutual mistake, fraud, ambiguity and lack of consideration. They also argued the releases were unenforceable under § 5 of FELA, 45 U.S.C.A. § 55 (1986). The district court consolidated the cases and granted Conrail's motions. This appeal followed.

E.

The able district judge observed that the executed releases "contain language which, on its face, relieves the defendant from future liability for any type of damage or harm suffered by the plaintiffs while in the railroad's employ." *Edward L. Wicker, Sr., et al. v. Consolidated Rail Corporation*, Civ. Nos. 93-41J, 94-15J, 94-36J, 94-132J, 95-105J (W.D.Pa. December 31, 1996) ("*Wicker*") at 6. Finding the language of the releases unambiguous and no evidence of mutual mistake, the court rejected plaintiffs' contract defenses. Because plaintiffs were represented by counsel and the releases were negotiated at arm's length, the court also rejected plaintiffs' argument that these were contracts of adhesion.

Addressing plaintiffs' FELA defense, the court acknowledged the split of authority on the enforceability of broadly written releases. It then turned to its recent decision in *Wicker v. Conrail*, Civ. No. 94-16J (December 19, 1996) ("*Wicker II*"), which "accorded great weight to the plaintiff's continuing employment with Conrail after settlement of his [original claim]." *Wicker* at 18. By contrast, each plaintiff here negotiated his release in the context of terminating, or already having terminated, his

employment with Conrail. According to the court, these releases "served the beneficial purpose of adjusting, and providing finality to, all claims between the parties." *Id.*

The district court also looked to *Wilson v. CSX Transp. Inc.*, Civ. No. 91-1398, slip op., (W.D.Pa. March 9, 1994), in which plaintiff sued his employer for shoulder injuries sustained in a work-related accident. Through settlement, plaintiff released his employer from "all claims, suits, [etc.] . . . which the [plaintiff] has or might have against [the railroad] . . . for any and all injuries . . . occurring prior to the date of [the release], including but not limited to injuries arising out of or in any way connected with [the shoulder injury]." *Wilson*, slip op. at 4. The term "injury" was defined in the release to include both known and unknown injuries. Several years later, plaintiff sued for an occupational hearing loss, arguing the claim was not barred because the release related only to claims arising from the injury to his shoulder, and the hearing loss did not accrue until after the settlement was signed. Granting the railroad's motion for summary judgment, the court noted the release specifically encompassed all injuries occurring prior to the date of settlement, regardless of whether plaintiff was aware of them. The *Wilson* court also noted the general release at issue "indicates that the parties were settling all known and unknown claims of injury . . . [and] that the parties were severing their relationship for all time and defendant was 'buying its peace' with plaintiff as to any such injuries." *Wilson* at 7.

In addition, the district court here reasoned that the economic motivation behind negotiating a broadly

worded release is consistent with the congressional purposes of FELA. The court found that persons who sign general releases tend to receive larger settlements, and that defendants are willing to pay higher sums to settle claims under a general release.[2] This, together with plaintiffs' representation by counsel led the court to believe that enforcement of the releases was "in the interest of both parties, when viewed from the time of the negotiating of the agreement." *Wicker* at 20.

F.

On appeal, plaintiffs have abandoned their arguments of mutual mistake, fraud, ambiguity, and lack of consideration. Their appeal relies entirely on the assertion that their executed general releases are void under § 5 of FELA, 45 U.S.C.A. § 55 (1986). Plaintiffs contend they were unaware of either the injuries or the cause of those injuries at the time the releases were executed, and offer supporting affidavits from the attorneys who represented them at the time. The releases are invalid, they claim, because "[u]nder FELA a release is only valid if it compromises a claimed liability." Pls.' Brief at 11. Consequently, § 5 of FELA "prevents workers from releasing claims which they do not know existed at the time they

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[2] "Broadly worded releases negotiated with departing or retired employees, as a matter of economic analysis, do not permit a FELA employer to exempt itself from future liability . . . [because] the liable employer under such a release pays the full discounted value of the known and unknown injuries of the settling parties." *Wicker* at 20.

executed a release for a separate known claim." *Id.* Plaintiffs maintain a general release of unknown and future claims does not bar later claims for injuries unknown at the time the release was executed. *Id.* at 13 (citing *Forry, Inc. v. Neundorfer, Inc.*, 837 F.2d 259 (6th Cir.1988)); *see also Lanham v. CSX Transp. Inc.*, 1995 WL 368171 (E.D.Pa. June 21, 1995) (finding that a general release executed in settlement of an employee's claim for a back injury did not bar a subsequent claim for an occupational disease of which the employee was unaware when he executed the release).

Conrail relies on the district court's analysis, especially the distinction between current and former employees. Because the releases were executed as part of a settlement of existing claims and the termination of employment, Conrail contends they were meant to put to rest all present and future claims. Conrail also contends plaintiffs' asserted symptoms or injuries existed before they executed the releases. Thus, even if the releases cover only those injuries manifest at the time of settlement, the "new" injuries were nonetheless released because plaintiffs were on notice of a potential health problem at that time.

G.

The district court had jurisdiction under 28 U.S.C. § 1331 and 45 U.S.C. § 51, as well as supplemental jurisdiction under 28 U.S.C. § 1367. We have jurisdiction under 28 U.S.C. § 1291.

We exercise plenary review of a grant of summary judgment. *Dyszel v. Marks*, 6 F.3d 116, 123 (3d Cir.1993).

We apply the same test as the district court. *Berner Int'l Corp. v. Mars Sales Co.*, 987 F.2d 975, 978 (3d Cir.1993). In so doing, we must view all evidence and draw all inferences therefrom in the light most favorable to the non-moving party. *Id.* In this case, the party attacking the validity of the release bears the burden of proof as to its invalidity. *Callen v. Pennsylvania R. Co.*, 332 U.S. 625, 630, 68 S.Ct. 296, 298, 92 L.Ed. 242 (1948).

II.

A.

In this appeal we must interpret the scope of § 5 of FELA, and in particular, whether its bar of "[a]ny contract . . . the purpose of which shall be to enable [an employer] to exempt itself" from FELA includes a general release of claims executed by an employee as part of a settlement. A brief review of the history of FELA and the accompanying case law is warranted.

In 1908, FELA "was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant." *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 507, 77 S.Ct. 443, 449, 1 L.Ed.2d 493 (1957). Congress sought to "ensure that the employees' suits would not be defeated by the same devices which Congress perceived to have been used in the immediate past by the railroads to avoid liability." *Damron v. Norfolk & W. Ry. Co.*, 925 F.Supp. 520, 523 (N.D.Ohio 1995). Thus, FELA was designed "to enable injured railroad workers to overcome a number of traditional defenses to tort liability that had previously operated to bar their actions." *Lewy v. Southern Pac. Transp. Co.*, 799 F.2d 1281, 1287 (9th Cir.1986). For

example, the Act abolished the doctrine of assumption of risk, applied comparative rather than contributory negligence, and sought to prevent employers from contracting out of FELA liability. *See* S. Rep. 460, 60th Cong., 1st Sess. 2-3 (1908). With respect to the last of these, Congress noted that many railroads "insist[ed] on a contract with their employees, discharging the company from liability for personal injuries." H.R. Rep. 1386, 60th Cong. 1st Sess. 6 (1908). Section 5 was passed specifically to remedy this problem.

B.

Shortly after FELA's adoption, the Supreme Court began to establish the boundaries of § 5. The Court upheld the validity of § 5 in *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 52, 32 S.Ct. 169, 176, 56 L.Ed. 327 (1912), noting that "if Congress possesses the power to impose liability . . . it also possesses the power to insure its efficacy by prohibiting any contract, rule, regulation or device in evasion of it." The same year, the Court examined § 5 in the context of a relief fund agreement by which acceptance of benefits constituted a release of all claims against the employer. *Philadelphia, B. & W.R. Co. v. Schubert*, 224 U.S. 603, 32 S.Ct. 589, 56 L.Ed. 911 (1912). Reasoning that this stipulation was simply a way for the employer to avoid liability by contract, and that it fell within the scope of § 5, the court held the release violated FELA. *Id.* at 612, 32 S.Ct. at 591-92.

Although *Schubert* addressed only agreements signed before injury, the Court later extended the bar to releases signed after injury. *Duncan v. Thompson*, 315 U.S. 1, 5-6, 62

S.Ct. 422, 423-24, 86 L.Ed. 575 (1942). In *Duncan*, the injured employee accepted $600 to cover his living expenses, agreeing to return the money in the event he brought suit against the employer. When the employee filed a claim without first refunding the $600, the railroad raised the contract as a defense. Focusing on whether "the purpose or intent" of the agreement was to enable the employer "to exempt itself from any liability" under FELA, the Court noted that, because of Duncan's financial condition, requiring the refund before commencing suit was tantamount to depriving him of the right to file suit, thereby exempting the employer from liability. *Id.* at 7, 62 S.Ct. at 424-25. It also noted the $600 was specifically earmarked for living expenses, and the agreement was a form commonly used to benefit employees until final settlement was negotiated. *Id.* at 7-8, 62 S.Ct. at 424-25. Consequently, it declined to discuss the validity of a release signed as part of a bona fide settlement, finding that the "very language of the agreement indicates it is not a compromise and settlement." *Id.*

The Court addressed that issue in *Callen v. Pennsylvania R. Co.*, 332 U.S. 625, 68 S.Ct. 296, 92 L.Ed. 242 (1948), where a railroad employee brought a FELA action after injuring his back in a work-related accident. As a defense, the railroad pleaded a general release executed by the employee, signed in exchange for $250, that relieved the railroad of "all claims and demands which [plaintiff] can or may have against the said Pennsylvania Railroad Co. for or by reason of personal injuries sustained." *Callen*, 332 U.S. at 626, 68 S.Ct. at 297. Plaintiff claimed that when he signed the release he was unaware he had a permanent injury. Although the primary issue on appeal was

whether the trial judge had improperly withdrawn the question of the release's validity from the jury,[3] the Court also addressed whether the release violated § 5 of FELA. Rejecting this argument, the Court said:

> It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation.

Id. at 631, 68 S.Ct. at 298-99. The language is clear. Releases are not *per se* invalid under FELA. Although the Court did not explain what will qualify as a "compromis[e][of] a claimed liability" it did say that parties may settle "[w]here controversies exist as to whether there is liability, and if so for how much." The explicit requirement is that a controversy must exist.

The Court provided some clarification in *Boyd v. Grand Trunk W.R. Co.*, 338 U.S. 263, 266, 70 S.Ct. 26, 27-28,

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[3] The Supreme Court held that the validity of the release was a jury question and that the trial judge's misleading instructions had effectively withdrawn the issue from the jury's consideration. The Court also rejected the argument that the burden of proof with respect to validity should be shifted to the railroad, noting that, regardless of the potential inequality of bargaining power between the parties, such a change was appropriately left to the discretion of Congress. Thus, until Congress "adopt[s] a policy depriving settlements of litigation of their prima facie validity . . . the releases of railroad employees stand on the same basis as the releases of others." *Id.* at 630, 68 S.Ct. at 298.

94 L.Ed. 55 (1949), noting that its *Callen* decision "distinguished a full compromise enabling the parties to settle their dispute without litigation, which we held did not contravene the Act, from a device which obstructs the right of the Liability Act plaintiff to secure the maximum recovery if he should elect judicial trial of his cause." In *Boyd*, the railroad advanced fifty dollars to its employee twice during the month following his work-related injury. On each occasion, the employee signed an agreement which provided that, if he elected to sue, "such suit shall be commenced within the county or district where I resided at the time my injuries were sustained, or in the county or district where my injuries were sustained and not elsewhere." *Id.* at 264, 70 S.Ct. at 26. The employee brought his claim in a different venue and the employer sued to enjoin the action. Examining the venue provision contained in § 6 of FELA,[4] the Supreme Court held "the right to select the forum granted in s. 6 is a substantial right." *Id.* at 266, 70 S.Ct. at 28. Consequently, "contracts limiting the choice of venue" obstruct a FELA plaintiff's fundamental right of recovery, and are therefore "void as conflicting with [§ 5 of] the [Federal Employers'] Liability Act."[5] *Id.* at 265, 70 S.Ct. at 27.

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[4] Section 6 of FELA provides, in part:

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action.

45 U.S.C. § 56 (1986).

[5] In addition to voiding general releases of FELA claims under § 5, the Court has also held such releases void on the

Despite this ruling, the proper application and reach of § 5 remains unclear. One reason may be that the Court's decisions rejecting general releases as bars to subsequent claims have been fact-driven, and consequently do not provide a generally applicable rule of law. Although the Supreme Court in *Callen* refused to void the releases executed in compromise of an employee's claims, the Court has not had occasion to explain how wide a net its ruling casts. Nonetheless, the case law provides us with some rough guidelines.

C.

To begin with, *Schubert* underscores that § 5 of FELA was designed to prevent employers from making the waiver of claims a quid pro quo of the employment contract. Unlike this case, *Schubert* dealt with a release that was signed before the employee was injured, clearly the type of contractual "shield" FELA was designed to prevent. Nonetheless, *Schubert* makes clear that Congress intended to prevent employers from depriving their employees of the right to recover for job-related injuries.

Duncan and *Callen* are also instructive. In *Duncan* the Court began shaping the requirements of § 5, concluding that the release was not part of a compromise and settlement. *Callen* was more specific and explicitly permitted

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grounds of fraud, *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 362, 72 S.Ct. 312, 314-15, 96 L.Ed. 398 (1952), and lack of consideration, *Maynard v. Durham & S. Ry. Co.*, 365 U.S. 160, 81 S.Ct. 561, 5 L.Ed.2d 486 (1961). Neither holding, however, provides any guidance as to the proper application of § 5.

releases "where controversies exist." Of course the release in *Callen* addressed only a specific injury.

Boyd holds that a FELA plaintiff may not waive his fundamental rights under the statute.[6] But *Boyd* relied on the specific venue provision in § 6 of FELA to support its conclusion that § 5 prohibited a waiver of venue. As noted, there is no specific section of the statute which addresses the rights of FELA plaintiffs to settle their claims.

In *South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367, 73 S.Ct. 340, 97 L.Ed. 395 (1953), the Court upheld a provision of the New York Workers' Compensation Law that effectively allowed an employee to waive its FELA rights. Plaintiff had been awarded $28 per week under the New York Workers' Compensation Law for injuries sustained while employed as a switchman. Two years later, after the employee died – and his remedy under FELA had lapsed

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[6] The Court has held, in the context of the Fair Labor Standards Act, that an employee cannot waive certain statutorily conferred rights. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704, 65 S.Ct. 895, 900-01, 89 L.Ed. 1296 (1945) (noting that a "statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy" and thus the plaintiffs could not waive minimum or overtime wages or liquidated damages); *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 66 S.Ct. 925, 90 L.Ed. 1114 (1946) (holding that an employee could not waive his right to liquidated damage, even if the release is made in settlement of a bona fide dispute as to coverage). While it is arguable that this is analogous to an employee waiving his fundamental right to file a FELA claim, making a general release invalid, the Court's decision in *Callen* would appear to undercut this reasoning.

– the employer attacked the award on the ground that the Workers' Compensation Board did not have jurisdiction. According to the employer, § 113 of the statute, which granted the Board jurisdiction to hear claims for injuries "subject to the admiralty or other federal laws," was unconstitutional as applied because permitting the Board to hear claims covered by FELA constituted a waiver of an employee's FELA rights. The Supreme Court disagreed. Noting that § 113 was permissive, and did not coerce an employee to give up its federal rights, the Court held that § 113 of the New York Workers' Compensation Law did not constitute an impermissible waiver under § 5 of FELA.[7]

The New York statute at issue in *Ahern* – allowing waiver of an employee's FELA claims when he or she receives compensation under the Workers' Compensation Law – is arguably no different than a private agreement to waive such claims as part of a settlement between the employee and the employer. But the facts of the case

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[7] The Court reviewed another attack on a FELA release in its per curiam decision in *Hogue v. Southern R. Co.*, 390 U.S. 516, 88 S.Ct. 1150, 20 L.Ed.2d 73 (1968). The issue in that case was whether a plaintiff who attacks the validity of a previously executed release must return the consideration paid for that release prior to commencing his FELA action. While the Court did not find it necessary to "decide whether the release here involved violated § 5," it noted that "a rule which required a refund as a prerequisite to institution of suit would be 'wholly incongruous with the general policy of the Act to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers.' " *Id.* at 518, 88 S.Ct. at 1152 (quoting *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 362, 72 S.Ct. 312, 314-15, 96 L.Ed. 398 (1952)).

counsel against extracting such a clearly defined rule of law. Unlike plaintiffs here, who have filed claims unrelated to their previous injuries, the employee in *Ahern* received benefits for injuries received in a specific accident only. Consequently, Ahern is closer to *Callen,* and while it supports the notion that releases are not *per se* invalid under FELA, it does not shed much light on the validity of the general releases at issue here. To the extent there is a key to understanding this question, it may be found in *Callen* where the court said parties may settle "[w]here controversies exist as to whether there is liability, and if so for how much."

D.

Not surprisingly, lower courts that have addressed this issue have disagreed on the proper interpretation of § 5. Some courts, including the district court here, have held that general releases do not contravene the purposes of FELA and may bar a subsequent claim. *See, e.g., Wilson v. CSX Transp., Inc.,* Civil Action No. 91-1398, slip op. (W.D.Pa.1994); *Williams v. Norfolk Southern Corp.,* CA 1:92-CV545-HTW (N.D.Ga. Jan. 22, 1993); *Satterfield v. CSX Transp., Inc.,* No. 93-002-R (W.D.Va. Dec. 22, 1993). Others have refused to allow a defendant to use a previously executed general release to block a subsequent FELA claim. *See, e.g., Babbitt v. Norfolk & Western Ry. Co.,* 104 F.3d 89 (6th Cir.1997); *Lanham,* 1995 WL 368171 (E.D.Pa. June 21, 1995); *Manis v. CSX Transp., Inc.,* 806 F.Supp. 177 (N.D.Ohio 1992).

As we have noted, the district court here gave great weight to the termination of plaintiff's employment.

Because the parties severed and terminated their relationship thus "buying [their] peace," the court reasoned the general release of claims signed by plaintiffs barred any subsequent claims for unrelated injuries.

The contrary view has been set forth by the United States Court of Appeals for the Sixth Circuit in *Babbitt*, and appears to establish a broad, legal rule prohibiting the use of general releases in cases such as this. The plaintiffs in *Babbitt* were former railroad employees who signed Resignation and Release Agreements as part Norfolk's Voluntary Separation Program. Subsequently, plaintiffs brought FELA claims for occupational hearing loss, and the district court granted defendant's motion for summary judgment, finding the releases barred plaintiffs' claims. The Sixth Circuit reversed, holding that "[t]o be valid, a release must reflect a bargained-for settlement of a known claim for a specific injury, as contrasted with an attempt to extinguish potential future claims the employee might have arising from the injuries known or unknown by him." 104 F.3d at 93.

Conrail contends that *Babbitt* is distinguishable on its facts because the releases in *Babbitt* were part of a "Voluntary Separation Program" which offered early retirement to railroad employees. Rather than the result of compromise of claims, the releases were a take-it-or-leave-it option offered to all employees. By contrast, the releases at issue here were all negotiated as part of the settlement of an existing claim – each was the result of arms-length bargaining between the plaintiff, his counsel, and the defendant railroad. No case cited by plaintiffs prohibiting general releases corresponds to the facts here. In both *Lanham*, 1995 WL 368171 (E.D.Pa. June 21, 1995), and

Manis, 806 F.Supp. 177 (N.D.Ohio 1992), cited by plaintiffs to support a broad reading of § 5, the courts focused on the nature of the releases signed, which were expressly limited to prior injuries and thus were not "general" releases of all claims.

III.

To be valid under FELA, a release must at least have been executed as part of a negotiation settling a dispute between the employee and the employer. *Schubert* and *Duncan* hold that a release of FELA claims given as a condition of employment, or signed without negotiation, is void under § 5. As noted, the holding in *Babbitt* was based in part on the fact that the releases formed part of a voluntary separation program, and were not the product of negotiations settling a claim. *See also Damron v. Norfolk & Western Railway Co.*, 925 F.Supp. 520, 525 (N.D.Ohio 1995).

It is also clear that an employer may not demand a release against potential claims as a condition of employment. The language of § 5 focuses on whether the employer is attempting to evade liability. *Schubert* invalidates those releases whose only purpose is to deprive employees of their FELA rights. *Schubert*, 224 U.S. 603, 32 S.Ct. 589, 56 L.Ed. 911 (1912); *see also* S. Rep. 460, 60th Cong., 1st Sess. 2-3 (1908); H.R. Rep. 1386, 60th Cong. 1st Sess. 6 (1908). But as noted, *Callen* permits an employer and an employee to negotiate a release of existing claims.

As the district court here noted, and review of the case law confirms, "FELA cases are inherently fact-bound." *Wicker* at 18. The evaluation of the parties' intent

at the time the agreement was made is an essential element of this inquiry. *See, e.g., Lanham*, 1995 WL 368171 at *1; *Forry*, 837 F.2d at 263; *Manis*, 806 F.Supp. at 179. In *Lanham*, for example, the court's decision turned on its belief that the release was intended to apply to the employee's earlier injury only, and could not bar a claim for subsequent injury. *Lanham* at *1.[8] The *Forry* court also noted that the "meaning to be given to the words of a contract must be the one that carries the intent of the parties as determined by the circumstances under which the contract was made." 837 F.2d at 263.

Examination of the parties' intent raises the troublesome question whether a general release in FELA cases is merely an engine by which an employer can evade FELA liability, or represents a rational and considered way to resolve claims and liabilities. On the one hand, FELA's underlying goal of allowing liberal recovery might counsel a finding that a general release of claims permits the employer to avoid FELA liability altogether and therefore violates § 5. But the Supreme Court appears to have rejected this view in *Callen*, permitting releases which

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[8] The plaintiffs, attempting to distinguish the *Lanham* decision from the *Wilson* decision relied on by the district court, argue that "the railroad in *Lanham* was unsuccessful [at avoiding liability] because of the protection provided by 45 U.S.C. Section 55." Plaintiffs' Brief at 16. As Conrail points out, however, the *Lanham* court's analysis turned on the specific language of the release and the intent of the parties, and not on some general prohibition grounded in the language of § 55. Consequently, the *Lanham* court's reference to 45 U.S.C. § 55 is dictum.

"compromis[e] a claimed liability and to that extent recogniz[e] its possibility." 332 U.S. at 631, 68 S.Ct. at 298. The question remains whether there is a way to protect employees' statutory rights while also upholding the parties' right to settle claims by contract.

A bright line rule like the one set forth in *Babbitt*, limiting the release to those injuries known to the employee at the time the release is executed, has the benefit of predictability. Under *Babbitt*, "a release must reflect a bargained-for-settlement of a known claim for a specific injury, as contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries known or unknown by him." 104 F.3d at 93. The Sixth Circuit noted that the releases in *Schubert* and *Duncan* were void because they "granted general immunity to the railroad as opposed to addressing a specific instance of disputed liability." *Id.*

Yet, it is entirely conceivable that both employee and employer could fully comprehend future risks and potential liabilities and, for different reasons, want an immediate and permanent settlement. The employer may desire to quantify and limit its future liabilities and the employee may desire an immediate settlement rather than waiting to see if injuries develop in the future. To put it another way, the parties may want to settle controversies about potential liability and damages related to known risks even if there is no present manifestation of injury.

The question still remains whether a rule allowing parties to release claims related to known risks rather than known injuries reflects FELA's remedial goals. We

believe it does. We hold that a release does not violate § 5 provided it is executed for valid consideration as part of a settlement, and the scope of the release is limited to those risks which are known to the parties at the time the release is signed. Claims relating to unknown risks do not constitute "controversies," and may not be waived under § 5 of FELA. *See Callen*, 332 U.S. at 631, 68 S.Ct. at 298-99. For this reason, a release that spells out the quantity, location and duration of potential risks to which the employee has been exposed – for example toxic exposure – allowing the employee to make a reasoned decision whether to release the employer from liability for future injuries of specifically known risks does not violate § 5 of FELA.

To the extent that a release chronicles the scope and duration of the known risks, it would supply strong evidence in support of the release defense. But we are wary of making the validity of the release turn on the writing alone because of the ease in writing detailed boiler plate agreements; draft releases might well include an extensive catalog of every chemical and hazard known to railroad employment. For this reason, we think the written release should not be conclusive. We recognize that what is involved is a fact-intensive process, but trial courts are competent to make these kinds of determinations. While the elusiveness of any such determination might counsel in favor of a bright-line rule such as the Sixth Circuit adopted in *Babbitt*, we decline to adopt one here.

Instead, we conclude that a release may be strong, but not conclusive, evidence of the parties' intent. Where a specific known risk or malady is not mentioned in the

release, it would seem difficult for the employer to show it was known to the employee and that he or she intended to release liability for it. Furthermore, where a release merely details a laundry list of diseases or hazards, the employee may attack that release as boiler plate, not reflecting his or her intent. We recognize that this is a different (and more difficult) standard for railroad employers than is typical in non-FELA situations, but given the Supreme Court's pro-employee construction of the FELA, *see Kernan v. American Dredging Co.*, 355 U.S. 426, 432, 78 S.Ct. 394, 398, 2 L.Ed.2d 382 (1958) ("it is clear that the general congressional intent was to provide liberal recovery for injured workers"); *Boyd*, 338 U.S. at 265, 70 S.Ct. at 27 ("Congress wanted Section 5 to have the full effect that its comprehensive phraseology implies.") (internal quotation omitted), we adopt it.

IV.

Applying this standard, we hold that the releases in question are invalid under § 5 of FELA. While there is little doubt the parties were involved in settling claims, the question of the parties' intent is more problematic.

As a general matter, the language of the releases appears to recite a standard waiver of liability. Even though there is no factual dispute that the agreements were reached during settlement negotiations, and that plaintiffs were all represented by counsel, the releases do not demonstrate the parties understood, let alone addressed or discussed, the scope of the claims being waived. For example, the McKee and Weaver releases are short, *pro forma* waivers, and do not indicate the parties

negotiated any part of the releases other than the amount of settlement. At the other extreme, the releases signed by Wicker and Kleiner are more detailed, blanket releases which attempt to cover all potential liabilities. But these releases merely recite a series of generic hazards to which Wicker and Kleiner might have been exposed, rather than specific risks the employees faced during the course of their employment. Consequently, the releases do not demonstrate the employees knew of the actual risks to which they were exposed and from which the employer was being released. Even the Kaltenbrunner release, which contains a special exclusion for claims relating to carpal tunnel syndrome, does not recite that plaintiff was aware of and understood the other risks to which he was exposed. Consequently, there is no evidence that any of the plaintiffs, despite being represented by counsel, was aware of the potential health risks to which he had been exposed. Therefore, they could not have properly waived these claims.

Conrail contends that even if the releases apply only to injuries plaintiffs were aware of at the time they signed the releases, their claims here are still barred because they had knowledge of at least some of their symptoms. Although plaintiffs testified they were aware of certain symptoms when they signed the releases, the record does not demonstrate that they knew that these symptoms were related to their exposure to toxic chemicals at Conrail's plant. To the contrary, plaintiffs testified they did not connect the symptoms with their chemical exposure until after they had signed the releases, and that they were not aware of the risks associated with the various chemicals used at Conrail's facility. Therefore, the

releases could not have settled claims with respect to those risks, and cannot bar plaintiffs' claims.

As noted, we hold that § 5 of FELA allows an employer to negotiate a release of claims with an employee provided the release is limited to those risks which are known by the parties at the time the release is negotiated. In the case before us, we find the releases signed by the parties violate § 5 because they purport to settle all claims regardless whether the parties knew of the potential risks. Because the releases cannot bar plaintiffs' FELA claims, we will reverse the judgment of the district court and remand for proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EDWARD L. WICKER, SR.,
Plaintiff

vs. Civil Action No. 93-41J

CONSOLIDATED RAIL CORPORATION,
Defendant

SAMUEL D. WEAVER,
Plaintiff

vs. Civil Action No. 94-15J

CONSOLIDATED RAIL CORPORATION,
Defendant

THOMAS E. KLEINER,
Plaintiff

vs. Civil Action No. 94-36J

CONSOLIDATED RAIL CORPORATION,
Defendant

JOHN M. McKEE,
Plaintiff

vs. Civil Action No. 94-132J

CONSOLIDATED RAIL CORPORATION,
Defendant

JOHN M. KALTENBRUNNER,
Plaintiff

vs. Civil Action No. 95-105J

CONSOLIDATED RAIL CORPORATION,
Defendant

MEMORANDUM

SMITH District Judge

I. Introduction

I have consolidated the five summary judgment motions now pending in the five matters captioned above for disposition herein. Each of the five plaintiffs has previously negotiated agreements with the defendant Conrail to settle claims for work-related injuries, in amounts ranging from $20,000 to $250,000. Each of the plaintiffs signed what appears to be, on its face, a release of any future claims which each might have against the defendant. All five plaintiffs have now returned to court with new lawsuits seeking damages for other injuries.

Plaintiffs assert that they misunderstood the scope of the releases they signed, and that those releases should therefore not be binding. Furthermore, each contends that he is not barred from brining the current action because, under Federal Employers Liability Act (FELA) precedent, releases are not enforceable to bar claims not in controversy at the time of the settlement.

This Court has jurisdiction pursuant to 28 U.S.C. § 1331(a), 45 U.S.C. § 51, and the principles of pendent jurisdiction under 28 U.S.C. § 1367. Venue is proper under 28 U.S.C. § 1391(a), as the defendant does business

in the Western District of Pennsylvania. For the reasons stated below, the Defendant's motions are granted.

II. Standard of Review

Summary judgment is to be "rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party opposing summary judgment may not rely on mere allegations or denial sin the pleadings; rather, it must respond by setting forth specific facts that show that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The court must view the facts and draw all inferences in the light most favorable to the non-moving party. *Ambruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir. 1994).

There must be sufficient evidence for a jury to render a verdict in favor of the nonmoving party; if the evidence is merely colorable or not significantly probative, summary judgment should not be granted. *Id.* "A disputed fact is 'material' if it would affect the outcome of the suit as determined by the substantive law." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

In FELA actions, a plaintiff's burden of proof is less onerous than in ordinary negligence cases because railroads are liable when "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury. . . . " *Lisek v. Norfolk and Western R. Co.*, 30 F.3d 823, 832 (7th Cir. 1994),

cert. denied, 115 S.Ct. 904 (1995) (quoting *Rogers v. Missouri Pac. R.R. Co.,* 352 U.S. 500, 506 (1957)); *see also Pehowic v. Erie Lackawanna R.R.,* 430 F.2d 697 (3d Cir. 1970) (FELA plaintiffs need only present minimum amount of evidence to defeat summary judgment motion).

Because FELA plaintiffs have a lighter burden of proof at trial, it is also easier for them to overcome summary judgment motions. A FELA plaintiff needs to produce only slight evidence of negligence to defeat a defendant's summary judgment motion. Summary judgment is possible, however, if a plaintiff provides no evidence at all to support the inference of negligence. *Hand v. Grand Trunk Western Railroad, Inc.,* 1995 WL 871175 at *2 (E.D. Mich. June 27, 1995) (citing *Lisek v. Norfolk and Western R. Co.,* 30 F.3d at 832).

III. Background

The plaintiffs are all former employees of Conrail who allege that they have suffered, and continue to suffer, ill-health effects from exposure to hazardous materials which were used at Defendant's Hollidaysburg Reclamation Plant in Blair County, Pennsylvania. *See* Complaints and Amended Complaints, Civil Action Nos. 93-41J, 94-15J, 94-36J, 94-132J, and 95-105J. Because of the similarity of the issues implicated in their claims, the five summary judgment motions filed by the defendant have been consolidated for ease of disposition herein.

Plaintiffs assert that extensive emissions into the reclamation plant's ground water supply and a surrounding environment of various hazardous substances such as PCB's, trichloroethylene, chlorinated solvents, caustic

soda, lead-based paint, magnesium, asbestos, dioxings, various petroleum-based products, weed-killer, hydraulic oil, subturbs, acetylene, turpentine, smoke, and other fumes, occurred in the past and continue into the present. *See* Complaints and Amended Complaints, Civil action Nos. 93-41J, 94-15J, 94-36J, 94-132J, 95-105J.

Plaintiffs aver that they have experienced physical problems including respiratory difficulties, delirium, dizziness, rashes, deleterious effects to the skin, fatigue, sore joints, nosebleeds, black mucus substances in the nose and mouth, infected tear ducts, sinusitis, nausea, indigestion, severe headaches, seizures, intermittent intense chest pain, numbness of limbs, kidney stones, ulcers, blood clots, and muscle cramps. They believe that other problems may yet surface, and that the effects of some of the hazardous materials to which they have been exposed are cumulative, as well as synergistically damaging. *Id.*

Defendant Conrail has moved for summary judgment in all five cases on the ground that the current lawsuits are barred by releases the railroad previously negotiated with plaintiffs. *See e.g.*, Defendant's Motion for Summary Judgment, Civil Action No. 94-132J, Docket No. 14.

All of the plaintiffs signed releases presented to them by Conrail. None signed under circumstances indicative of continuing employees status. Plaintiff Wicker, who retired in 1982, signed a release in 1988. Civil Action No. 93-41J, Docket No. 86. Plaintiff Kleiner signed a release on August 6, 1992, less than one month before his retirement. Civil Action No. 94-36J, Docket No. 9. Plaintiffs Weaver, McKee, and Kaltenbrunner all executed Letters of Agreement terminating their employment with Conrail

for all time in conjunction with their releases. Civil Action No. 94-15J, Docket No. 8, Exh. 2; Civil Action No. 94-132J, Docket No. 14, Exh. 2; Civil Action No. 95-105J, Docket No. 6, Exh. 2.

These releases contain language which, on its face, relieves the defendant from future liability for any type of damage or harm suffered by the plaintiffs while in the railroad's employ. Defendant contends that the plaintiffs have no contractual defenses, and that, therefore, the releases should shield it from liability in these actions. *See, e.g.*, Civil Action No. 93-41J, Docket No. 85.

Plaintiffs counter by asserting that, upon signing their respective releases, they understood them to relate solely to the following injuries, respectively: for Plaintiff Kaltenbrunner, a back injury; for Plaintiff McKee, a back injury; for Plaintiff Weaver, a back injury; for Plaintiff Kleiner, asbestos exposure; and for Plaintiff Wicker, asbestos exposure. All have submitted either their own affidavits or the affidavits of the attorneys who advised them upon signing the releases. These affidavits aver that the releases were not intended to discharge Conrail from liability for injuries caused by environmental exposure. The plaintiffs also aver that they were either not aware of the dangers of the chemical exposure to which they were allegedly subjected, or that they did not connect any symptoms to chemical exposure at the railroad until after signing their releases. *See e.g.*, Affidavit of Ed Wicker, Sr., Civil Action No. 94-16J, Docket No. 88.

IV. Discussion

A. Overview

I am once again called upon to interpret Section 55 of the FELA, *see e.g. Wicker v. Conrail*, 94-16J, and to decide its applicability to releases signed by departing or former employees. The statute reads as follows:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void; *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

45 U.S.C. § 55.

Before FELA was enacted, many railroads insisted that their employees sign contracts discharging the company from any liability for injuries. H.R. Rep. 1386, 60th Cong., 1st Sess. 6 (1908). Passage of the FELA, and Section 55 specifically, prevents employers from negotiating such agreements. Some scholars believe that these agreements are economically beneficial because they place the risk of injury upon a party who either desires to accept it,

or is best able to avoid an accident.[1] Such agreements, it is reasoned, thereby increase efficiency and safety. Nevertheless, at a time when railroading was more dangerous than it is today, and accidents were common, Congress decided that the more appropriate course was to make such contracts void. *See Bay v. Western Pac. R. Co.*, 595 F.2d 514, 515 (9th Cir. 1979); *See also Hines v. Consolidated Rail Corp.*, 926 F.2d 262 (3d Cir. 1991) (FELA passed in 1908 to provide compensation for railroad workers who then experienced among the highest accident rates in the United States history).

Courts are bound to interpret 45 U.S.C. § 55 so as to promote the congressional purpose of prohibiting employers from attempting to avoid tort liability through contract, while at the same time not impeding the legitimate settlement of claims. Admittedly, the wording of the statute is not a model of clarity. It took the Supreme Court in *Callen v. Pennsylvania R. Co.*, 332 U.S. 625, 631 (1948), to remove some of the confusion caused by the statute. In that case, the Court upheld the validity of releases in FELA cases, observing that "[i]t is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation."

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[1] *See, e.g.*, Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 Emory L.J. 1, 66 (1993).

Neither the basic validity of releases as a means of settling cases, nor the governing law[2] to be applied in interpreting them, remains a question under 45 U.S.C. § 55. Courts have, however, continued to arrive at different conclusions concerning the validity of a release as a bar to subsequent litigation, when the release covers harm broader in scope than the injuries which gave rise to the previous claim and settlement. The reluctance of some courts to enforce such releases is not surprising. Blind enforcement of broadly-worded agreements could severely undermine the purposes of the statute.

B. Validity of Plaintiffs' Executed Release

In pertinent part, the releases which Plaintiffs Kleiner and Wicker signed, read as follows:

> [I,] being of lawful age and sound mind, . . . do hereby release and . . . discharge Consolidated Rail Corporation, . . . and all other related persons and corporations, . . . *from any and all losses,* claims, liabilities, actions, causes of action, judgments, verdicts, awards, and demands of whatsoever kind or nature . . . which I have or to which I claim to be entitled *by reason of any injuries, known or unknown, foreseen or unforeseen* (including but not limited to pulmonary disorders of any type; pleural plaque(s), calcification and/or thickening; fibrosis of any kind, asbestosis, cancer(s) of any type, origin or nature; death; anxiety or fear of contracting cancer or

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[2] The validity of releases in FELA actions is governed by federal law. *Maynard v. Durham & S. Ry. Co.*, 365 U.S. 160, 161 (1961).

> some other physical condition; and/or any increased risk of contracting cancer) *which now exist or which may arise in the future . . . as a result of or in any way connected with my alleged exposure to any condition . . . (or) substance . . . supplied or permitted to exist by "Releasees"* and/or arising out of or *which may arise out of any working condition, of any kind, during my employment by "Releasees". . . . I hereby declare and represent that the injuries and illnesses which have been or may be sustained, including mental conditions resulting from asbestos exposure or exposure to any substance, condition or environment or a belief that I was exposed to asbestos, or any substance, condition or environment, are, or may be permanent, and that recovery therefrom is uncertain and indefinite, and that they may cause or lead to other deleterious conditions, including but not limited to cancer and/or my death. . . .*

See Civil Action No. 94-36J, Docket No. 9; Civil Action No. 93-41J, Docket No. 88, Exh. A. (emphasis added).

Those signed by Plaintiffs McKee, and Weaver read as follows:

> I . . . *hereby release and forever discharge* the said Consolidated Rail Corporation . . . *from all claims, demands, actions and causes of action of every kind* whatsoever and including, but without limitation of the foregoing, *all liability for damages, costs, expenses and compensation of any kind, nature or description now existing or which may hereafter arise from or out of injuries and damages, known or unknown, permanent or otherwise,* sustained or received by me, at or near Hollidaysburg, . . . Pennsylvania. . . . IT IS UNDERSTOOD AND AGREED THAT THIS IS

A FULL AND FINAL RELEASE AND THAT PAYMENT OF THE ABOVE STATED CONSIDERATION IS NOT AN ADMISSION OF LIABILITY.

See Civil Action No. 94-132J, Docket No. 14, Exh. 1; Civil Action No. 94-15J, Docket No. 8, Exh. 1. (emphasis added).

The release signed by Plaintiff Kaltenbrunner reads as follows:

> I, John M. Kaltenbrunner, . . . *do hereby release and forever discharge* the said Consolidated Rail corporation . . . *from all claims, demands, actions and causes of action of every kind whatsoever and including, but without limitation of the foregoing, all liability for damages, costs, expenses and compensation of any kind, nature or description now existing or which may hereafter arise from or out of any and all incidents, illnesses, diseases, conditions, injuries and damages, known or unknown, permanent or otherwise which were or could have been included in th[is] lawsuit.* . . . THIS RELEASE SPECIFICALLY EXCLUDES ANY CLAIMS OR CAUSES OF ACTION THAT JOHN KALTENBRUNNER HAS OR MAY HAVE IN THE NATURE OF OCCUPATIONALLY RELATED CARPAL TUNNEL SYNDROME OR OCCUPATIONALLY RELATED REPETITIVE MOTION INJURIES INVOLVING THE UPPER EXTREMITIES ONLY BUT DOES NOT WAIVE ANY SUBSTANTIVE OR PROCEDURAL DEFENSES THERETO. IT IS UNDERSTOOD AND AGREED THAT THIS IS A FULL AND FINAL RELEASE AND THAT PAYMENT OF THE ABOVE STATED CONSIDERATION IS NOT AN ADMISSION OF LIABILITY.

At the bottom, the release reads: THIS IS NOT A RECEIPT FOR WAGES*IT IS A GENERAL RELEASE. *See* Civil Action No. 95-105J, Docket No. 6, Exh. 1.

1. Contract Defenses.

All plaintiffs argue that their intent was to release Conrail only from liability for the back injuries and asbestos exposures suffered by each of them respectively. They claim that because "[t]he record is devoid of any sworn testimony, affidavits, or other evidence indicating that Conrail intended to release any injuries other than those related to . . . exposure to asbestos [or back injuries], . . . a triable issue of fact remains as to the validity of the settlement agreement." *See* Civil Action No. 94-36J, Docket No. 11 at 13-14. Plaintiffs assert that a genuine issue of material fact exists as to whether the releases were procured through fraud or mistake. Because Plaintiffs have not pointed to any evidence of fraudulent conduct on the part of Conrail, I shall address only the question of mistake.

The law of contracts governs releases signed to compromise FELA actions. The obligation to be bound by the terms of a signed agreement applies in the same manner to injured railroad employees as to any other contracting party. *Good v. Pennsylvania Railroad Co.*, 384 F.2d 989, 990 (3d Cir. 1967). Because the construction of releases entered into to compromise a FELA action is governed by the law of contracts, a presumption arises that the plaintiffs are bound by the words set forth in the releases they signed. *Id.* Plaintiffs, as the parties attacking the settlement, also bear the burden of showing that the releases

are tainted by a mutual mistake under which both sides acted. *Callen*, 332 U.S. at 625.

Mutual mistake can invalidate releases. In *Loose v. Consolidated Rail Corporation*, 534 F. Supp. 260, 263-64 (E.D. Pa. 1982), the court differentiated between two types of mutual mistakes, one due to prognosis, the other due to diagnosis. Mutual mistakes concerning the extent and outcome of injuries are future, not present facts, and therefore should not serve as grounds for setting aside a release. Mutual mistakes concerning present injuries, on the other hand, result from faulty diagnosis, and can invalidate an agreement. *Id.* (citing *Robertson v. Douglas Steamship Co.*, 510 F.2d 829, 836 (5th Cir. 1975). Mistakes are "sufficient to avoid releases only when the mistake goes to the nature of the injury, not to the expected course of healing." *Id.; accord Edwards v. Western & Atlantic R.R.*, 552 F.2d 137 (5th Cir. 1977); *Barnes v. St. Louis Southwestern Railway Co.*, 1992 WI, 72131 at *2 (March 25, 1992 D. Kan.); *Manis v. CSX Transportation, Inc.*, 806 F. Supp. 177, 179 (N.D. Ohio 1992).

Although Plaintiffs' newly-alleged injuries might qualify under the category of misdiagnosis, Plaintiffs must still show that any mistaken belief was held not only by them, but also by the defendants. *Wilson v. CSX Transportation, Inc.*, 83 F.3d 742, 744 (6th Cir. 1995), *Damron v. Norfolk and Western Railway Company*, 925 F. Supp. 520, 525 (N.D. Ohio 1995).

Defendant emphatically denies that there was any mistake on its part. Conrail contends that it executed valid general releases with the plaintiffs, as was its intent. Plaintiffs' counsel are unable to point to any ambiguity in

the releases. This is because the releases are unambiguous. Because of Plaintiffs' failure to show any mistaken belief on the part of the Defendant, the doctrine of mutual mistake cannot serve to invalidate the agreement.

Plaintiffs also attempt to argue that the language of general release constituted "boilerplate" language. *See* Civil Action No. 94-36J, Docket No. 11. But boilerplate denotes language "having a definite meaning in the same context without variation." It is used to describe standard language in documents that "is identical in instruments of a like nature." Black's Law Dictionary 159 (5th ed. 1979). The inclusion of boilerplate within a contract does not render it invalid *per se*. I believe that what plaintiffs mean to argue is, rather, that the broad language of release in the agreements rendered them contracts of adhesion.

"Adhesion contracts are not the product of bargaining between the parties but are no more than an offer by one party to the other on a 'take it or leave it' basis." *Brokers Title Co. v. St. Paul Fire & Marine Ins. Co.*, 610 F.2d 1174, 1179 (3d Cir. 1979). They are characterized by a lack of bargaining over the terms they contain, and a lack of objective manifestation of assent to the offensive terms. Often the dominant party knows that the terms are unacceptable to the other, and therefore uses minute print, legalese, or high pressure to obtain a signature. *Id.* at 1180.

I find no evidence that the releases signed by Plaintiffs constituted contracts of adhesion. All of the plaintiffs had the benefit of legal counsel when they signed the releases, and the language employed was neither opaque

nor obscure. In the releases signed by McKee, Weaver, and Kaltenbrunner, the words "full and final release" are fully capitalized and prominently displayed. In the releases signed by Kleiner and Wicker, the words "all," "every," "any," and "forever" appear often and prominently. These are words commonly understood by both laymen and lawyers. They are words that give, or should give, one pause before signing a document.

There is also substantial evidence to indicate that the language of the releases was bargained for. Plaintiffs Kaltenbrunner's release specifically excludes claims involving carpal tunnel syndrome, indicating that he was fully aware that the scope of the release covered more than his back injury. Plaintiffs McKee, Weaver, and Kaltenbrunner all executed Letters of Agreement terminating their employment with Conrail, in conjunction with signing releases. Each of the plaintiffs received different amounts in settlement of their claims, which indicates that the claims were individually negotiated. *See Damron v. Norfolk and Western Railway Co.*, 925 F. Supp. 520 (N.D. Ohio 1995).

I find, therefore, that plaintiffs assented to the broad release language. "A person of legal age is presumed to know the meaning of words in a contract, and if, . . . he enters into an agreement not in his best interest he cannot later be heard to complain that he was not acquainted with its contents and did not understand the meaning of the words used in the instrument that he signed." *Brokers Title*, 610 F.2d at 1181. Plaintiffs' counsel had the obligation to fully advise plaintiffs of the significance of the releases. *See Hamel v. Consolidated Rail Co.*, C.A. No.

95-33J, slip op. (W.D. Pa. 1996). Unless the FELA, provided Plaintiffs an affirmative defense, the releases will be enforced as written.

2. FELA Defenses

Courts differ as to whether broadly-worded releases are valid under FELA. One decision from this district upholds a general release, *Wilson v. CSX Transportation, Inc.*, C.A. No. 91-1398, slip op. (W.D. Pa. 1994). In *Wilson*, the plaintiff sought damages from CSX for an injured shoulder suffered in an accident occurring on December 27, 1983. On Mach 15, 1988, in exchange for $235,000, he signed a release which provided:

> The undersigned acknowledges receipt of [$235,000.00] from CSX . . . in full settlement and satisfaction of all claims, suits, costs, debts, demands, actions and causes of action . . . which the undersigned has or might have against them or any of them for any and all injuries to person and/or damage to property occurring prior to the date of this SETTLEMENT AND FINAL RELEASE, including but not limited to injuries and/or damages arising out of or in any way connected with [the December 27, 1983] accident/injury]. . . . The words "injuries and/or damages" where used in this SETTLEMENT AND FINAL RELEASE, include all injuries and/or damages which are unknown as well as injuries and/or damages which are known and include all consequences of such injuries which may hereinafter develop as well as consequences now developed.

Wilson later brought an action for noise-induced hearing loss which he claimed did not accrue until 1989. He relied upon the principle that releases are disfavored in the law and that therefore, they should be strictly construed, in arguing that his case should go forward. Judge Diamond granted summary judgment for the defendant, analyzing the wording of the release, and finding no genuine issue of material fact as to its validity or meaning. He emphasized that the plaintiff had been represented by counsel when he signed the release, and should have known that the very nature of a general release is that it settles all matters between the parties forever. *Accord Williams v. Norfolk Southern Corp.*, CA 1:92-CV-545-HTW (N.D. Ga. Jan. 22, 1993); *Satterfield v. CSX Transportation, Inc.*, No. 93-002-R (W.D. Va. Dec. 22, 1993); *Loy v. Illinois Central Railroad Co.*, Law No. 73065 (Iowa Dist. Ct. Dec. 2, 1994).

Other courts have refused to enforce releases in FELA cases. *See, e.g., Lanham v. CSX Transportation, Inc.*, 1995 WL 368171 (E.D. Pa. June 21, 1995); *Brophy v. Cincinnati, New Orleans & Texas Pacific Railway Co.*, 855 F. Supp. 213, 216 (S.D. Ohio 19940; *Manis v. CSX Transportation, Inc.*, 806 F. Supp. 177, 179 (N.D. Ohio 1992) (release of a known back injury does not release an unknown, unclaimed, and unconnected hearing loss injury); *Moody v. Norfolk & Western Railway Co.*, No. C-2-94-31 slip op. at 11-12 (S.D. Ohio March 22, 1995) (general language in release barring known and unknown claims does not bar unknown claims when the release was executed as a settlement for known injuries); *Forry, Inc. v. Neundorfer, Inc.*, 837 F.2d 259, 263 (6th Cir. 1988).

FELA cases are inherently fact-bound. I recently held in *Wicker v. Conrail,* Civil Action No. 94-16J, that a general release signed after negotiating an asbestos case settlement could not prevent a current employee from bringing a new toxic tort claim under 45 U.S.C. § 55. In that case, I accorded great weight to the plaintiff's continuing employment with Conrail after settlement of his asbestos claim. In the instant matter, however, all the releases in question were negotiated in the context of the plaintiffs' leaving, or having already left, the defendant's employment. The releases thereby served the beneficial purpose of adjusting, and providing finality to, all claims between the parties.

Thus, of the various cases I have reviewed, the *Wilson* opinion is most apposite to the facts before me. Judge Diamond noted the benefits of broadly-worded releases in such circumstances:

> the language of the contract indicates that the parties were settling all known and unknown claims of injury that could be construed to have arisen from plaintiff's employment. The instant general release indicates that the parties were severing their relationship for all time and defendant was "buying its peace" with plaintiff as to any such injuries.

Wilson at 7.

I believe the reasoning of *Wilson* is not only sound policy, but is also faithful to the literal words of the statute. Some might attempt to argue that effectuating such broadly-worded releases with former or soon-to-be former employees would be a means by which railroads could exempt themselves from congressional-imposed

liability under FELA. Such an argument reflects a failure to understand the negotiating process.

When two parties enter into a release, they do so under conditions of uncertainty. Individuals who sign general releases demand and receive higher settlements than they would to settle specific claims. This compensates them for signing away the right to sue for injuries that might arise in the future. Defendants like Conrail are willing to pay a higher amount to settle under a general release agreement than under a specific release, either for reasons of efficiency in dealing with claims, or to eliminate uncertain liabilities. Therefore, with respect to unknown injuries which may, or may not ever occur, general releases provide the trade-off of a certain, discounted present payment in lieu of an uncertain future payment.

Broadly-worded releases negotiated with departing or retired employees, as a matter of economic analysis, therefore, do not permit a FELA employer to exempt itself from future liability. Barring fraud, duress, or incompetence on the part of the signer of the release, the liable employer under such a release pays the full discounted value of the known and unknown injuries of the settling party.

Enforcement is, therefore, in the interest of both parties, when viewed from the time of the negotiating of the agreement. As noted by the Seventh Circuit, "[c]ontracts allocate risks, and judicial reallocation interferes with not only negotiation but also the economic processes the contracts govern. By enforcing contractual language rather than molding it until the outcome looks more fair

ex post, courts in the end serve all contracting parties' interests." *PSI Energy, Inc., v. Exxon Coal USA Inc.*, 17 F.3d 969, 974 (7th Cir. 1994). *See also Brokers Title Co. v. St. Paul Fire & Marine Ins. Co.*, 610 F.2d 1174, 1179 (3d Cir. 1979) ("The indispensable tool in the operation of a free enterprise society . . . is contract.").

Plaintiffs all were represented by counsel when they signed releases. They chose to sign those releases on the advice of their counsel. Now, although unsatisfied with the contracts they signed, they must abide by them. *See United States v. National Steel Corporation*, 75 F.3d 1146, 1151 (7th Cir. 1996). A decision to the contrary would only lead to uncertainty in the future adjustment of FELA claims, hinder attempts at settlement by employers, and ultimately lead to more litigation. *See* Richard A. Posner, *Economic Analysis of Law* 8 (4th ed. 1992) ("Rational people base their decisions on their expectations of the future rather than on their regrets about the past. . . . If a party for whom a contract . . . turns out badly is allowed to revise [its] terms *ex post*, few contracts will be made.").

Defendant's motions for summary judgment are granted. An appropriate order follows.

IN THE UNTIED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EDWARD L. WICKER, SR.,

Plaintiff

vs. Civil Action No. 93-41J

CONSOLIDATED RAIL CORPORATION,

Defendant

SAMUEL D. WEAVER,

Plaintiff

vs. Civil Action No. 94-15J

CONSOLIDATED RAIL CORPORATION,

Defendant

THOMAS E. KLEINER,

Plaintiff

vs. Civil Action No. 94-36J

CONSOLIDATED RAIL CORPORATION,

Defendant

JOHN M. McKEE,

Plaintiff

vs. Civil Action No. 94-132J

CONSOLIDATED RAIL CORPORATION,

Defendant

JOHN M.
KALTENBRUNNER

Plaintiff

vs. Civil Action No. 95-105J

CONSOLIDATED RAIL
CORPORATION,

Defendant

ORDER

AND NOW, this 31st day of December, 1996, in accordance with Federal Rule of Civil Procedure 56(c), and the foregoing memorandum, Defendant's motions for summary judgment in the following Civil Action Nos.: 93-41J, 94-15J, 94-36J, 94-132J, and 95-105J are GRANTED. The Clerk shall mark these cases closed.

By the Court,

/s/ D. Brooks Smith
D. Brooks Smith
United States
District Judge

cc: All Counsel

RELEASE AGREEMENT

KNOW ALL MEN BY THESE PRESENT: Thomas E. Kleiner and Livia Kleiner, hereinafter referred to as "RELEASOR", being of lawful age and sound mind, for the sole consideration of Twenty Thousand Dollars ($20,000.00) to me/us in hand paid, receipt of which is hereby acknowledged, do hereby release and hereby forever discharge Consolidated Rail Corporation, Penn Central Corporation, National Railroad Passenger Corporation and Pennsylvania Truck Lines, Inc. (for exposures through and including March 1, 1990), individually, and/or as successor-in-interest or liability to any other entity, Penn Central Transportation Company, Trustees of the property of the Penn Central Transportation Company, Pennsylvania Railroad, New York Central Railroad, Erie-Lackawanna, Inc. and/or Lehigh Valley Railroad Company (hereinafter collectively referred to as "RELEASEES") and all other related persons and corporations, and its (their) present and former insurers, owners, heirs, executors, administrators, subsidiaries, divisions, predecessors-in-business-or-interest, successors-in-business or interest, directors, officers, attorneys, medical personnel, employees, successors, and assigns of and from any and all losses, claims, liabilities, actions, causes of action, judgments, verdicts, awards and demands of whatsoever kind or nature (including but not limited to compensatory, punitive and/or loss of consortium) which RELEASOR has or to which RELEASOR claims to be entitled by reason of any injuries, known or unknown, foreseen or unforeseen (including but not limited to pulmonary disorders of any type or origin; pleural plaque(s), calcification and/or thickening; fibrosis of any

kind; asbestosis; mesothelioma; cancer(s) of any type, origin or nature; death; anxiety or fear of contracting cancer or some other physical condition; and/or any increased risk of contracting cancer) [sic] which now exist or which may arise in the future as a result of or in any way connected with Plaintiff or claimant's alleged exposure to any condition; material, substance, product and/or good(s) of any kind or nature (including but not limited to dust, mists, silica, fumes, gases, vapors, diesel fumes, agents, chemicals, asbestos or toxic/deleterious substances of any kind) supplied or permitted to exist by "RELEASEES" and/or arising out of or which may arise out of any working condition, of any kind, during Plaintiff or claimant's employment by "RELEASEES" including, but not limited to, exposure to or any working condition or environment created by the existence of any dust, fumes, vapors, gases, diesel fumes, mists, silica, chemicals, agents, asbestos or toxic/deleterious substances of any kind and/or exposure to any material, substance, product, good(s), or working condition(s) generally or as otherwise may have occurred.

RELEASOR hereby declares and represents that the injuries and illnesses which have been or may be sustained, including mental conditions resulting from asbestos exposure or exposure to any substance, condition or environment or a belief that Plaintiff or claimant was exposed to asbestos, or any substance, condition or environment, are, or may be permanent, and that recovery therefrom is uncertain and indefinite, and that they may cause or lead to other deleterious conditions, including but not limited to cancer and/or Plaintiff or claimant's death, and that in making this Release, it is

understood and agreed that the undersigned rely wholly upon the undersigneds' own judgment, belief, and knowledge of the nature, extent, effect, duration, and other possible results of said injuries, illnesses, conditions, exposures, and liability therefore, and that the Release is made without reliance upon any statement or representation by the "RELEASEES" or their representatives, the making of any such statements or representations being specifically denied and that possible future conditions, as yet undetected, including but not limited to cancers of any kind sustained by Plaintiff or claimant and/or death, are specifically included.

It is understood that other than as may be recited herein, no claims or demands are being released which RELEASOR may have against any other person or corporation, not named herein, related to the aforesaid exposure(s), or similar exposures, or the damages referred to in the Release; but the damages recoverable against said other persons or corporations shall be reduced, extinguished or satisfied in accordance with the terms of this Release. In the event it is determined that RELEASEES, individually or in any combination thereof, and any other persons, corporation or entity are joint tortfeasors with respect to my injuries, death and/or damages, then the damages recoverable against all such tortfeasors other than RELEASEES shall be reduced by the amount of the larger of the following two sums:

a) the amount paid as consideration for this Release; or

b) that proportion of the total dollar amount awarded as damages in the ratio of the proportionate amount of causal liability, causal

negligence, and/or liability of any nature or based upon any theory of the persons and corporations released herein and against whom a verdict or judgment is entered to the amount of causal liability, causal negligence, and/or liability of any nature or manner or based upon any theory attributed to all other persons and corporations against whom a verdict, judgment or award is entered or obtained.

Should it be determined that RELEASEES were not tortfeasor with respect to my injuries, death and/or damages, then there will be no reduction in damages recoverable from any other person, corporation or entity.

However, if as a consequence of a lawsuit, a verdict or judgment in my favor results in a claim, verdict or judgment for contribution and/or indemnity against RELEASEES, individually or in any combination thereof, then RELEASOR and RELEASOR'S attorneys agree that RELEASOR will reduce my/our claim or satisfy the verdict or judgment to the extent necessary to eliminate the claim of liability of RELEASEES, individually and/or in any combination thereof, either to us or to any party claiming contribution and/or indemnity. Further, RELEASOR agrees that RELEASOR will take no action to prevent RELEASEES from asserting its/their rights of contribution and/or indemnity against other parties determined to be joint tortfeasors with them to the extent that the payment herein has discharged the common liability or has exceeded the individual share of the liability and, further, RELEASOR agrees that to the extent that RELEASEES, individually and/or in any combination thereof, are entitled to indemnity and/or contribution,

RELEASOR will reduce or satisfy my/our verdict or judgment against such other joint tortfeasors.

It is specifically intended that this release is a Joint Tortfeasors Release pursuant to the terms of the Uniform Contribution Among Tortfeasors Act. The Joint Tortfeasors Act or such similar act as may be applicable, with the additional provision that this release is intended to extinguish all rights of contribution and/or indemnity against RELEASEES, individually or in any combination thereof.

RELEASOR further agrees to indemnify and hold harmless the "RELEASEES" from any and all losses, claims, causes of action, actions, liabilities, judgments, verdicts, awards and demands of whatsoever kind or nature growing out of any claim or suit against them for contribution and/or indemnity by any other tort-feasor or alleged tort-feasor or other person or corporation allegedly liable for any of the damages and/or conditions referred to in this Release as a result of a breach of this Agreement and this Warranty, or by anyone acting on RELEASOR'S behalf or on behalf of any such persons or corporations for the purpose of enforcing a further claim for damages on account of the alleged exposures and/or damages and/or conditions referred to herein.

It is further understood and agreed that RELEASOR hereby agrees to indemnify and hold harmless all the persons and corporations released herein of and from any and all liability, actions, judgments and demands arising from or in any way connected to or with subrogation claims or liens for any compensation or medical payments due or claimed to be due or paid under any law

(state or federal), regulation or contract, and from all losses, claims, liabilities, actions, causes of action, judgments, verdicts, awards and demands of whatsoever kind or nature arising as a result of or pertaining in any way to the matters referred to in this Release.

RELEASOR agrees to execute all appropriate and necessary documents to enable all the persons and corporations released herein to plead the effect of this Release Agreement in any lawsuit(s). RELEASOR also agrees to obtain all necessary court approval for this settlement and Release Agreement. RELEASOR further agrees to plead this Release and to enter this Release of record, on behalf of any person or corporation named herein, at any trial of any action seeking recovery for any item of damage set forth herein.

RELEASOR understands, agrees and acknowledges that the payment referred to herein is in compromise of a disputed claim and shall not be construed as an admission of liability on the part of any of the persons or corporations released herein, since liability is expressly denied.

It is further understood and agreed that this is the complete release agreement, and that there are no written or oral understandings or agreements, directly or indirectly connected with this Release and settlement that are not incorporated herein.

This agreement shall be construed that wherever applicable the use of the singular number shall include the plural number and shall be binding upon and inure to the successors, assigns, heirs, executors, administrators, and legal representatives of the respective parties hereto.

THE UNDERSIGNED HEREBY ACKNOWLEDGE THAT I/WE HAVE READ THIS RELEASE AGREEMENT CONSISTING OF 1 PAGES, AND UNDERSTAND ITS TERMS, HAVE CONFERRED WITH MY/OUR ATTORNEY, AND UNDERSTAND THAT BY SIGNING THIS RELEASE AGREEMENT I/WE HAVE RELEASED MY/OUR RIGHTS REFERENCED HEREIN AGAINST "RELEASEES" AND THE OTHER PERSONS AND CORPORATIONS REFERRED TO HEREIN AND ITS (THEIR) INSURERS, AND THAT I/WE HAVE LIMITED MY/OUR RIGHTS AGAINST OTHER PARTIES AND ANY OTHER TORT-FEASORS AND OTHERWISE LIABLE PERSONS AND CORPORATIONS IN ACCORDANCE WITH THE TERMS OF THIS RELEASE AGREEMENT.

IN WITNESS WHEREOF, we have hereunto set forth our hands and seals this 6th day of August, 1992, intending to be legally bound hereby.

WITNESS:

/s/ James Rodgus

/s/ Thomas E. Kleiner 207-20-0737
Thomas E. Kleiner, SS#

/s/ Livia Kleiner 210-24-6973
Livia Kleiner, SS#

/s/ Robert A. Kosseff
Attorney for Thomas E. Kleiner
and Livia Kleiner

TOTAL SETTLEMENT AMOUNT: $20,000.00

State of Pennsylvania)
) ss:
County of Blair)

On this 6th day of August, 1992, before me personally appeared Thomas E. Kleiner and Livia Kleiner to me known to be the persons named in and who executed the release and acknowledged that they executed same as their free act and deed.

Witness my hand and notarial seal the date aforesaid. My commission expires March 11, 1996.

/s/ Ruth D. Crouch
Notarial Seal
Ruth D. Crouch, Notary Public
Hollidaysburg Borough, Blair County
My Commission Expires March 11, 1996

Member, Pennsylvania Association of Notaries

GENERAL RELEASE

THIS IS NOT A RECEIPT FOR WAGES

KNOW ALL MEN BY THESE PRESENTS, that I, John W. McKee, of 2915 West Chestnut Avenue, Altoona, Pennsylvania, for the sole consideration of TWO HUNDRED FIFTY THOUSAND AND NO/100 - - - ($250,000.00) - - - Dollars received to my full satisfaction from CONSOLIDATED RAIL CORPORATION and without any other agreement, promise or representation, written or oral, I hereby release and forever discharge the said CONSOLIDATED RAIL CORPORATION, its predecessor, affiliated and subsidiary companies and any and all other parties, associations and corporations jointly or severally liable, J.W.M. from all claims, demands, actions and causes of action of every kind whatsoever and including, but without limitation of the foregoing, all liability for damages, costs, expenses and compensation of any kind, nature or description now existing or which may hereafter arise from or out of injuries and damages, known or unknown, permanent or otherwise, sustained or received by me. J.W.M. at or near Hollidaysburg, State of Pennsylvania, on or about the tenth day of April, 1990

I have read and understand this release – J.W.M.

IT IS UNDERSTOOD AND AGREED THAT THIS IS A FULL AND FINAL RELEASE AND THAT PAYMENT OF THE ABOVE STATED CONSIDERATION IS NOT AN ADMISSION OF LIABILITY.

IN WITNESS WHEREOF, I have hereunto set my hand _____ and seal _____ this eleventh day of September, 1992

/s/ John W. McKee (Seal)
John W. McKee

_____ (Seal)

_____ (Seal)

This release was read _____ and signed by the said John W. McKee who said that he understood it to be a complete and final release, in our presence at Altoona, Pennsylvania on the eleventh day of September, 1992

1. /s/ Richard A. Rauch
(Name)
108 E. Fairview Ave, Altoona Pa.
(Address)

2. /s/ Robert A. Kosseff
(Name)
1528 Walnut St. Phila. Pa. 19102
(Address)

3. _____
(Name) (Address)

THIS IS NOT A RECEIPT FOR WAGES *
IT IS A GENERAL RELEASE

GENERAL RELEASE

THIS IS NOT A RECEIPT FOR WAGES

KNOW ALL MEN BY THESE PRESENTS, that I, Samuel D. Weaver, of RD #3, Box 680, Altoona, Pennsylvania, for the sole consideration of ONE HUNDRED FIFTY THOUSAND AND NO/100 - - - ($$150,000.00) - - - Dollars received to my full satisfaction from CONSOLIDATED RAIL CORPORATION and without any other agreement, promise or representation, written or oral, I hereby release and forever discharge the said CONSOLIDATED RAIL CORPORATION, its predecessor, affiliated and subsidiary companies and any and all other parties, associations and corporations jointly or severally liable, S.D.W. from all claims, demands, actions and causes of action of every kind whatsoever and including, but without limitation of the foregoing, all liability for damages, costs, expenses and compensation of any kind, nature or description now existing or which may hereafter arise from or out of injuries and damages, known or unknown, permanent or otherwise, sustained or received by me. S.D.W. at or near Hollidaysburg, State of Pennsylvania, on or about the 13th day of February, 1989 S.D.W.

I have read and understand this release – S.D.W.

IT IS UNDERSTOOD AND AGREED THAT THIS IS A FULL AND FINAL RELEASE AND THAT PAYMENT OF THE ABOVE STATED CONSIDERATION IS NOT AN ADMISSION OF LIABILITY.

IN WITNESS WHEREOF, I have hereunto set my hand _____ and seal _____ this 18th day of September, 1991

/s/ Samuel D. Weaver (Seal)
Samuel D. Weaver

_____ (Seal)

_____ (Seal)

This release was read _____ and signed by the said Samuel D. Weaver who said that he understood it to be a complete and final release, in our presence at Altoona, Pennsylvania on the 18th day of September, 1991

1. /s/ Richard A. Rauch
(Name)
108 E. Fairview Ave, Altoona Pa.
(Address)

2. /s/ Sandra J. Morgan
(Name)
R.D. #1 Box 494, Patton, Pa. 16668
(Address)

3. _____
(Name) (Address)

THIS IS NOT A RECEIPT FOR WAGES *
IT IS A GENERAL RELEASE

_____

GENERAL RELEASE
THIS IS NOT A RECEIPT FOR WAGES

KNOW ALL MEN BY THESE PRESENTS, I, John M. Kaltenbrunner, for the sole consideration of Fifty Thousand Dollars ($50,000.00) received to my full satisfaction from Consolidated Rail Corporation, and without any other agreement, promise or representation, written or oral from Consolidated Rail Corporation, I do hereby release and forever discharge the said Consolidated Rail Corporation, its officers, directors, agents and employees and its predecessors, affiliated and subsidiary companies and any and all other parties associations and corporations jointly or severally liable, from all claims demands, actions and causes of action of every kind whatsoever and including, but without limitation of the foregoing, all liability for damages, costs, expenses and compensation of any kind, nature or description now existing or which may hereafter arise from or out of any and all incidents, illnesses, diseases, conditions, injuries and damages, known or unknown, permanent or otherwise which were or could have been included in the lawsuit brought by me encaptioned *John M. Kaltenbrunner v. Consolidated Rail Corporation*, United States District Court for the Eastern District of Pennsylvania, Civil Action No. 94-CV-2496, including any claim I may have under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., or similar enactment J M K

THIS RELEASE SPECIFICALLY EXCLUDES ANY CLAIMS OR CAUSES OF ACTION THAT JOHN KALTENBRUNNER HAS OR MAY HAVE IN THE NATURE OF OCCUPATIONALLY RELATED CARPAL TUNNEL SYNDRONE OR OCCUPATIONALLY

RELATED REPETITIVE MOTION INJURIES INVOLVING THE UPPER EXTREMITIES ONLY BUT DOES NOT WAIVE ANY SUBSTANTIVE OR PROCEDURAL DEFENSES THERETO J M K

IT IS UNDERSTOOD AND AGREED THAT THIS IS A FULL AND FINAL RELEASE AND THAT PAYMENT OF THE ABOVE STATED CONSIDERATION IS NOT AN ADMISSION OF LIABILITY.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 7th day of November, 1994.

/s/ John M. Kaltenbrunner
John M. Kaltenbrunner
(SEAL)

(SEAL)

(SEAL)

This release was read and signed by the said John M. Kaltenbrunner who said that he understood it to be a complete and final release, in our presence at Altoona, Pennsylvania on the 7th day of November, 1994.

1. /s/ Richard A. Rauch
108 E. Fairview Ave. Altoona (WITNESS)

2. /s/ Charles S. Shannon
328 E. 21st Ave. Altoona, PA 16601 (WITNESS)

3. (WITNESS)

THIS IS NOT A RECEIPT FOR WAGES *
IT IS A GENERAL RELEASE

I have read and understand this release. JMK

RELEASE AGREEMENT

KNOW ALL MEN BY THESE PRESENTS that I, Edward L. Wicker, being of lawful age and sound mind, for the sole consideration of Twenty-one Thousand Dollars ($21,000.00), to me in hand paid, receipt of which is hereby acknowledged, do hereby release and hereby discharge Consolidated Rail Corporation, individually and/or as successor-in-interest or liability to any other entity, Penn Central Corporation, Penn Central Transportation Company, Trustees of the property of the Penn Central Transportation Company, New York Central Railroad, the Pennsylvania Railroad, Lehigh Valley Railroad and/or the National Railroad Passenger Corporation and all other related persons and corporations, and their present and former insurers, owner, heirs, executors, administrators, subsidiaries, division, predecessors-in-business-or-interest, successors-in-business-or-interest, directors, officers, attorneys, medical personnel, employees and assigns (hereinafter referred to as "RELEASEES") of and from any and all losses, claims, liabilities, actions, causes of action, judgments, verdicts, awards, costs, attorneys fees and demands of whatsoever kind or nature (including but not limited to compensatory and punitive) which I have or to which I claim to be entitled by reason of any injuries, known or unknown, foreseen or unforeseen (including but not limited to pulmonary disorders of any type; pleural plaque(s) or thickening; fibrosis of any kind; asbestosis; cancer(s) of any type origin or nature; death; anxiety or fear of contracting cancer or some other physical condition; and/or any increased risk of contracting cancer) which now exist or which may arise in the future as a result of or in any way connected with my alleged

exposure to any material, substance, product and/or good(s) of any kind or nature (including but not limited to dust, fumes, vapors, mists, gases, agents, asbestos or toxic substances of any kind) supplied or permitted to exist by RELEASEES, and/or any arising out of or which may arise out of any working condition, of any kind, during my employment by RELEASEES including, but not limited to, exposure to or any working condition or environment created by the existence of any dust, fumes, vapors, mists, gases, agents, asbestos or toxic substances of any kind and/or any material, substance, product or working condition(s) generally and as particularly set forth in any Complaint and other pleadings filed in any lawsuit(s) instituted in a court of competent jurisdiction or any proceeding, administrative or quasi judicial.

I hereby declare and represent that the injuries and illnesses which have been or may be sustained, including mental conditions resulting from asbestos exposure or exposure to any substance, condition or environment or a belief that I was exposed to asbestos, or any substance, condition or environment, are, or may be permanent, and that recovery therefrom is uncertain and indefinite, and that they may cause or lead to other deleterious conditions, including but not limited to cancer, and that in making this Release, it is understood and agreed that I rely wholly upon my own judgment, belief, and knowledge of the nature, extent, effect, duration and other possible results of said injuries, illnesses, conditions, exposures, and liability therefore, and that this Release is made without reliance upon any statement or representation by the RELEASEES or their representatives, the making of any such statements or representations being

specifically denied and that possible future conditions, as yet undetected, including but not limited to cancers of any kind, are included.

It is understood that other than as may be recited herein, no claims or demands are being released which I may have against any other person or corporation, not named herein, related to the aforesaid exposure(s), or similar exposures, or the damages referral to in the Release; but the damages recoverable against said other persons or corporations shall be reduced, extinguished or satisfied in accordance with the terms of this Release. In the event it is determined that RELEASEES, individually or in any combination thereof, and any other persons, corporation or entity are joint tortfeasors with respect to my injuries, death and/or damages, then the damages recoverable against all such tortfeasors other than RELEASEES shall be reduced by the amount of the larger of the following two sums:

a) the amount paid as consideration for this Release; or

b) that proportion of the total dollar amount awarded as damages in the ratio of the proportionate amount of causal liability, causal negligence, and/or liability of any nature or based upon any theory of the persons and corporations released herein and against whom a verdict or judgment is entered to the amount of causal liability, causal negligence, and/or liability of any nature or manner or based upon any theory attributed to all other persons and corporations against whom a verdict, judgment, or award is entered or obtained.

Should it be determined that RELEASEES were not a tortfeasor with respect to my injuries, death and/or damages, then there will be no reduction in damages recoverable from any other person, corporation or entity.

However, if as a consequence of a lawsuit, a verdict of judgment in my favor results in a claim, verdict or judgment for contribution and/or indemnity against RELEASEES, individually or in any combination thereof, then I and my attorneys agree that we will reduce my claim or satisfy the verdict or judgment to the extent necessary to eliminate the claim of liability of RELEASEES, individually and/or in any combination thereof, either to me or to any party claiming contribution and/or idemnity. Further, I agree that I will take no action to prevent RELEASEES from asserting its/their rights of contribution and/or idemnity against other parties determined to be joint tortfeasors with them to the extent that the payment herein has discharged the common liability or has exceeded the individual share of the liability and, further, I agree that to the extent that RELEASEES, individually and/or in any combination thereof, are entitled to indemnity and/or contribution, I will reduce or satisfy my verdict or judgment against such other joint tortfeasors.

It is specifically intended that this release is a Joint Tortfeasor Release pursuant to the terms of the Uniform Contribution Among Tortfeasors Act, July 19, 1951, P.L. 1130, as re-enacted by the Act of 1976, July 9, P.L. 586 (42 Pa. C.S.A. Section 8321 et seq.) and is intended and shall be construed to release and protect RELEASEES from all claims of contribution and/or indemnity pursuant to that act, the Comparative Negligence Act or otherwise.

It is further understood that my attorneys are authorized to make on my behalf and in my name such objections to testimony by any person or any other evidence presented to identify the RELEASEES as joint tortfeasors in any case, and to file in my name any pre-trial and/or post-trial motions regarding such testimony or evidence, to present testimony or evidence limited solely to disputing such identification and to file an appeal in my name from any adverse trial rulings, verdicts or judgments concerning product identification, only to the extent such objections, motions, testimony and appeals are permitted by the laws of Pennsylvania, in light of the effect that the finding of joint liability on the part of the RELEASEE might have on my recovery from non-settling defendants under the Pennsylvania Uniform Contribution Among Tortfeasors Act. It is expressly understood that nothing herein gives me the right to file any pleading, motion, appeal or other document in the name of or on behalf of any RELEASEES and that I am expressly prohibited from taking any action in the name of or on behalf of any RELEASEES, it being the intent of the parties to this Release that my attorneys shall not and do not represent the RELEASEES.

I, and my counsel, further agree to indemnify and hold harmless the RELEASEES, from any and all losses, claims, demands, liabilities, causes of action, judgments, verdicts, awards, costs, fees or expenses of whatsoever kind or nature growing out of any claim or suit against them for contribution and/or indemnity by any other tortfeasor or alleged tortfeasor or other person or corporation allegedly liable for any of the damages and/or

conditions referred to in this Release as a result of a breach of this Agreement and this Warranty.

I further agree to indemnify and hold harmless all the RELEASEES from any and all losses, claims, demands, liabilities, actions, causes of action, judgments, verdicts, awards, costs, fees or expenses of whatsoever kind or nature growing out of any claim or suit against them for contribution and/or indemnity by any manufacturer or supplier of any product or substance or any other tortfeasor or alleged tortfeasor or any other person, corporation or entity allegedly liable for any of the damages and/or conditions referred to in this Release.

It is further understood and agreed that I hereby agree to indemnify and hold harmless all the persons and corporations released herein of and from any and all liability, actions, judgments, costs, expenses and counsel fees arising from or in any way connected to or with any subrogation claims or liens for any compensation or medical payments due or claimed to be due or paid under any law (state or federal), regulation or contract, and from all losses, claims, liabilities, actions, causes of action, judgments, verdicts, awards, costs, fees, expenses and demands of whatsoever kind or nature arising as a result of or pertaining in any way to the matters referred to in this Release.

It is understood and agreed that any issue concerning the interpretation of this document or its effect upon the parties thereto or upon any person or entity not a party thereto shall be governed by the law of the Commonwealth of Pennsylvania.

I agree to execute all appropriate and necessary documents to enable all the persons and corporations released herein to plead the effect of this Release Agreement in any lawsuit(s). I also agree to obtain any necessary court approval for this settlement and Release Agreement. I further agree to plead this Release and to enter this Release of record, on behalf of any person or corporation named herein, at any trial of any action seeking recovery for any item of damage set forth herein.

It is further understood and agreed that this is the complete release agreement, and that there are no written or oral understandings or agreements, directly or indirectly connected with this Release and settlement that are not incorporated herein.

This agreement shall be construed that wherever applicable the use or the singular number shall include the plural number and shall be binding upon and inure to the successors, assigns, heirs, executors, administrators, and legal represenatives [sic] of the respective parties hereto.

I understand, agree and acknowledge that the payment referred to herein is in compromise of a disputed claim and shall not be construed as an admission of liability on the part of any of the persons or corporations released herein, since liability is expressly denied.

I HEREBY ACKNOWLEDGE THAT I HAVE READ THIS RELEASE AGREEMENT AND UNDERSTAND ITS TERMS, HAVE CONFERRED WITH MY ATTORNEY, AND UNDERSTAND THAT BY SIGNING THIS RELEASE AGREEMENT I HAVE RELEASED MY RIGHTS REFERENCED HEREIN AGAINST RELEASEES,

AND THAT I HAVE LIMITED MY RIGHTS AGAINST OTHER PARTIES AND ANY OTHER TORTFEASORS AND OTHERWISE LIABLE PERSONS AND CORPORATIONS IN ACCORDANCE WITH THE TERMS OF THIS RELEASE AGREEMENT.

IN WITNESS WHEREOF, I have hereunto set forth my hand and seal this 19th day of Jan, 1988, intending to be legally bound hereby.

/s/ Edward L. Wicker (SEAL)
EDWARD L. WICKER

/s/ Robert H. Brobyn (SEAL)
For Brobyn & Forceno